CRACKED JUSTICE—ADDRESSING THE UNFAIRNESS IN COCAINE SENTENCING

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

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CRACKED JUSTICE—ADDRESSING THE UNFAIRNESS IN COCAINE SENTENCING

TUESDAY, FEBRUARY 26, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:05 p.m., in room 2237, Rayburn House Office Building, the Honorable Robert C. "Bobby" Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Conyers, Scott, Nadler, Jackson Lee, Smith, Gohmert, and Coble.

Staff present: Bobby Vassar, Subcommittee Chief Counsel; Ameer Gopalani, Majority Counsel; Rachel King, Majority Counsel; Mario Dispenza (Fellow), ATF Detailee; Veronica Eligan, Majority Professional Staff Member; Caroline Lynch, Minority Counsel; and Kelsey Whitlock, Minority Staff Assistant.

Mr. SCOTT. Good afternoon. The Committee will now come to order. I am pleased to welcome you today to the hearing before the Subcommittee on Crime, Terrorism, and Homeland Security entitled "Cracked Justice—Addressing the Unfairness in Cocaine Sentencing." We will be discussing legislation currently pending before the House, including H.R. 79, H.R. 460, H.R. 4545 and H.R. 5035.

It appears that most Members of Congress, as well as the public, agree that the current disparity in crack and powder cocaine penalties is not justified and that it should be fixed. However, there is not yet a clear consensus on what that fix should be. Science shows that there is no significant pharmacological difference between the two forms of the same drug, and there is no credible evidence or history to show a justification for either the current or any other disparity in penalties for the two forms of cocaine.

Method of ingesting a drug does not seem to be a justification for different penalties. Whether smoked, snorted or injected, penalties for no other drugs are based on the manner of ingestion.

Neither violence nor any other history of use between the forms seems to justify the difference in penalties. The Sentencing Commission reports show that 90 percent of crack transactions do not involve violence, compared to 94 percent of powder transactions that do not. Such a small difference can easily be handled by enhancing penalties based on the violence of a particular case, whether crack or powder, rather than generally based only on the form of the drug.

The original basis for the penalty differentiation was neither science, evidence or history based, but political bidding based on who could be the toughest on the crack epidemic that was believed to be sweeping America several years ago. There is certainly no sound basis for a 5-year mandatory minimum sentence for the mere possession of five grams of crack, when you could get probation for possessing a ton of powder, because mandatory minimum sentences for powder only apply to distribution, not possession cases.

Mandatory minimum sentences generally have been shown to be ineffective. Indeed, mandatory minimums have been studied extensively and have been found to distort any rational sentencing process to the point of violating common sense. It discriminates in application against minorities and wastes money, when compared to traditional sentencing approaches.

While there is no real difference between crack and powder cocaine, the distinction has real consequences. More than 80 percent of the people convicted in Federal court for crack offenses are African Americans and are serving shockingly long sentences, while people who have committed more serious offenses are serving shorter ones. African American communities have been hit hard, and many people have lost confidence in our legal system.

The U.S. Sentencing Commission has released at least four reports in the last 14 years on this subject, each time urging Congress to amend the cocaine sentencing laws. So far these exhortations have fallen on deaf ears. I am hoping that this hearing will be the beginning of the coming to a consensus about the best way to solve the problem.

There are many bills that will be considered, and what I have introduced is H.R. 5035, The Fairness in Cocaine Sentencing Act of 2008. It is a simple bill that goes the furthest in addressing the problems in the current cocaine sentencing laws.

First, it eliminates the legal distinction between crack and powder cocaine, treating them as the same drug, which they are. The bill also eliminates all mandatory minimum sentences for cocaine offenses. And lastly, it authorizes funding for state and Federal drug courts, which have both proven to be effective in preventing recidivism and saving money, when compared to longer periods of incarceration.

In the late 1980's and 1990's, states' court systems began to develop drug courts. Instead of locking everybody up, these courts decided to try something different. Drug offenders were placed on probation, with the condition that they enter into a drug treatment program. They were allowed to stay in their communities with their families, keeping their jobs and being productive members of society, while the drug court judges kept a close on them, offering them help as needed and providing sanctions when appropriate.

Drug courts are working. Studies have repeatedly shown that they are not only reducing crime, but saving money, and it is imperative that these drug courts continue to operate. My bill provides continued financial support for state drug courts, and it authorizes money for Federal drug courts, where the need exists.

Finally, my bill eliminates all mandatory minimum sentences for cocaine offenses, handing back the sentencing decisions to judges,

who are best equipped to determine the appropriate sentence in individual cases. Judges know how to do their jobs. We need to let them do it.

Indeed, mandatory minimum sentences should be eliminated in all instances, as the Federal Judicial Conference has often asked us to do. And I can't think of a better place to start than with the cocaine sentencing laws.

I would hope that Members would join in supporting H.R. 5035 and that today will be beginning of the end of two decades of legal discrimination.

It is my pleasure now to recognize the esteemed Ranking Member of the Subcommittee, the Honorable Louie Gohmert, who represents Texas' first congressional district.

Mr. GOHMERT. Thank you, Chairman Scott. I want to thank you for scheduling this hearing on this important matter.

Some perceive that the different treatment of cocaine and powdered cocaine has an unfair impact on African American offenders. On the other hand, some claim that more severe treatment of crack cocaine offenders is justified because of the higher rate of violence associated with crack cocaine trafficking. Some with no knowledge of the history of this disparate or distinctly treatment for crack and powder cocaine have even claimed that it has its roots in racial prejudice. However, just the opposite appears to be true.

Over 20 years ago Congress enacted statutory mandatory minimum sentences for various illegal drugs, including a 5-year mandatory minimum sentence for trafficking five grams of crack cocaine and 500 grams of powder and a 10-year mandatory minimum sentence for trafficking 50 grams of crack cocaine and five kilograms of powder cocaine.

The 100:1 ratio between crack cocaine and powder cocaine was enacted in response to an epidemic of violence across America associated with the trafficking of crack cocaine. Democratic leaders were the primary sponsors of Federal drug sentencing policies, including this dissimilar treatment of crack cocaine and powder cocaine.

In fact, one of the Members who was on the Committee back during debate of this matter 20 years ago recalled that some Members of Congress were individually challenged that failure to pass the bill with the tougher sentences for crack would potentially be racist for not caring enough about African American communities to make the penalty for spreading such poison in their midst far tougher than powder cocaine.

In 1986, 17 of 21 African American House members had co-sponsored the bill making this disparate treatment a part of the sentencing. Congressman Rangel was so effective in his advocacy for this bill—now being condemned by many—that at the signing ceremony, President Reagan called attention to Congressman Rangel as one of the "real champions in the battle to get this legislation through Congress."

In some ways these drug sentencing policies have had a significant impact in reducing violence in our cities, but rather than viewing criminal offenses through rational eyes, one important consideration by the Sentencing Commission is the data and studies

showing that crack cocaine is associated with violence to a greater degree than most other controlled substances.

In fiscal year 2002, 23.1 percent of all Federal crack offenders possessed a weapon—almost double that of powder cocaine at 12.1 percent rate. In fiscal year 2005, weapon involvement for crack cocaine offenders was 27.8 percent versus 13.6 percent for powder cocaine offenders.

In addition, the percentage of crack defendants at criminal history category six—those offenders with long criminal records—increased to 23.5 percent in fiscal year 2005 from the 20.2 percent figure in fiscal year 2002. A much smaller percentage of powder cocaine defendants were involved with a weapon or weren't at criminal history category six in both 2002 and 2005.

The Justice Department's views on this issue are of particular interest, since Federal prosecutors are on the frontlines, fighting the war against drug related violence in our communities. Attorney General Mukasey has raised serious and significant concerns with respect to the Sentencing Commission's retroactivity decision, noting that "nearly 1,600 convicted crack dealers, many of them violent gang members, will be eligible for immediate release into communities nationwide."

I share the attorney general's concern about the U.S. Sentencing Commission has reached in amendments to the Federal sentencing guidelines and its decision to apply those changes retroactively to incarcerated defendants. As a former judge and chief justice, I am vigilantly reluctant to legislatively overturn the past judgment of judges or juries, who were in the best position to consider the offense and the offender.

I support a re-examination of Federal drug sentencing laws and do believe this is worth a bipartisan re-examination of these laws during this session. To me the role of Congress should be to set a range of punishment for different offenses or offenses with different elements, then allow the courts to set the sentence within that range. Such constitutional obligations should not necessarily be delegated, in my opinion, to a Sentencing Commission.

I would also submit that there is another lesson to be learned here. Even when Members of Congress are encouraged to create different treatment for any matter based on a racial consideration of any kind, even when such encouragement is coming from members of that race, it should require heightened scrutiny. Race simply should not be a reason for a call to action for treating anyone or any offense differently.

In the present case, perhaps the proper solution is to make sentence ranges the same for cocaine and crack, but add other elements that would increase the range, such as possession of a weapon during the crime or actual violence during the crime or violence with a deadly weapon actually used during the crime.

With that, Mr. Chairman, we appreciate the witnesses being here today and look forward to their input. And I look forward to the continuing discussion of this issue by our Committee. Thank you.

Mr. SCOTT. Thank you—if other Members have statements they would like to give.

The first panel will consist of Members——

Mr. GOHMERT. Mr. Chairman.

Mr. SCOTT. The gentleman from Michigan?

The gentleman from Michigan, Chairman of the full Committee, Mr. Conyers?

Mr. CONYERS. I wanted to welcome the witnesses, Chairman Scott, a formidable array of distinguished people. I look forward to this important hearing.

Is there a seat for Chairman Rangel here? Oh, yes.

Over the past 20 years, our Nation's laws with respect to cocaine sentencing have resulted in a penal system unjust, racially disparate, and arguably in violation of the Constitution's equal protection clause. Most of us, even including the Administration, agree that the current system is unfair and that change is needed, but what change?

Crack cocaine offenders, almost all of whom are racial minorities, receive sentences of up to eight times longer than those convicted for the same amount of cocaine in powder form. That is well understood. And so this is the first time in over a decade that Congress can enact much needed reform.

And that is what makes 10 of you as important, thoughtful witnesses so important this afternoon.

The Supreme Court has provided impetus, and various Members have introduced bills to reform the system, including four bills we will hear about today. I would like to see these reforms take shape, as I conclude, in three ways.

We must dispel the myths associated with the current system. We must do away with all mandatory minimum sentences that exist in the current system. And finally, we need to offer innovative solutions that are proven to work.

The Ranking Member of the Crime Subcommittee—Judge Gohmert—and Chairman Scott have authorized an ambitious bill, which would not only eliminate mandatory minimum sentences, but authorize money for the state courts.

I ask unanimous consent to insert the rest of my statement in the record. And I thank you very much, Chairman Scott.

Mr. SCOTT. Thank you.

I recognize the gentleman from Texas——

Mr. SMITH. Thank you, Mr. Chairman.

Mr. SCOTT [continuing]. Member of the full Committee.

Mr. SMITH. Thank you, Mr. Chairman.

I also want to thank the Ranking Member of the Subcommittee for his insightful opening statement just a couple of minutes ago. And my statement is not going to go the full 5 minutes, so we will not be late getting to the vote.

Last May the U.S. Sentencing Commission voted to reduce crack cocaine sentences by an average of 16 months. As a result, next Monday, March 3, more than 1,500 Federal crack cocaine offenders will be eligible for release from prison. Over three-quarters of these criminals are repeat offenders, and 98 possessed firearms during the commission of their crimes.

The early release of these individuals poses a significant threat to innocent Americans. According to the commission's own data, 80 percent of those eligible for release next Monday have been convicted of other crimes. Research by the commission also shows that

those with the most serious criminal records—142 offenders—will likely commit another crime after they are released.

Congress and the American people also should be able to find out how many violent repeat offenders, who may be released early next week, commit additional crimes. This data is critical to understanding the impact of the commission's reduction of crack cocaine sentences.

Finally, many crack offenders eligible for release next week will not be able to participate in pre-release programs designed to help them transition back to their communities and so reduce recidivism. This is astounding, in light of the broad bipartisan support in the House for the Second Chance Act, which funds extensive new re-entry programs for offenders.

The Department of Justice has called on Congress to enact legislation to reverse the ruling, particularly its application to violent repeat offenders. Congress should act before next Monday to prevent the release of numerous violent offenders into our communities. If Congress does not act, it is certain that innocent children and adults will unnecessarily become the victims of violent crime. Congress should stop that from happening or assume responsibility for the pain and suffering caused by these preventable crimes.

I thank you, Mr. Chairman, and I will yield back.

Mr. SCOTT. We have a vote scheduled. We have a couple of minutes, if——

Mr. Rangel, do you want to make your statement now?

TESTIMONY OF THE HONORABLE CHARLES B. RANGEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. RANGEL. Extremely grateful, because the facts are abundantly clear. And I am so glad that your Committee and your Subcommittee and the full Committee have seen fit to air the injustices that exist in our system. I am a former Federal prosecutor, and believe me, in order for a law to be respected, it has to be consistent, and it has to make sense.

There is no question in my mind that those people who thought that people involved with possession of crack should be sentenced at higher thought—that it would in some way serve the community better. Clearly, that is not the case, and we find that to take the discretion in determining who goes to jail and who doesn't go to jail is showing lacks of confidence in our judges.

I can tell you that anyone who knows Federal judges will tell you that in many of the mandatory cases, judges have refused to convict. They just refuse to be pushed around. They refuse to give someone 5 years and use the excuse of reasonable doubt just because they believe the person should have gotten 1 year or should have gotten a reprimand or should have been punished in some way. But to tell them that to decide that a reasonable doubt, that they have to lose their common sense in judgment in terms of sending someone to jail for 5 or 10 years to me doesn't make a lot of sense.

So I introduced a bill that eliminates the mandatory and takes away the disparity between how cocaine is sold, whether it is crack or whether it is in powder.

And I am so glad, Mr. Chairman, that you have your bill, and Sheila Jackson Lee.

And I only hope that once we get our common sense back that we take a look at the entire question of mandatory sentences. If we don't trust our judges, then just put in different sets of facts, let a machine come out and give a sentence and get away from all of this having to decide what is in the best interest of justice.

So thank you for this opportunity, and I will do whatever I can and go wherever I can to bring equity and fairness to the system. And this is really done by just being fair.

[The prepared statement of Mr. Rangel follows:]

PREPARED STATEMENT OF THE HONORABLE CHARLES B. RANGEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Good afternoon Chairman and members of the subcommittee. Thank you for inviting me to speak at a hearing of such import and consequence, one addressing the injustice of stringent crack cocaine sentencing.

The drumbeat for change has never been louder: Unfair sentences for low-level crack cocaine offenders just have got to stop. Over the past few months, authorities in the other branches have gotten the message. Last year, the Supreme Court restored judicial discretion and flexibility in sentencing, and the Sentencing Commission retroactively lowered its sky-high sentencing guidelines. It is now up to my colleagues in Congress to follow suit and do away with the 20-year legacy of an unjust and nonsensical drug policy. My bill, H.R. 460, The Crack Cocaine Equitable Sentencing Act, would do just that, by eliminating the mandatory minimum for simple possession of crack or powder and reducing all other cocaine sentencing disparities to equal levels.

At the time these stiff penalties were enacted, they were seen as the well-intentioned cure to a frightening epidemic. The sudden rise of this new street drug, crack cocaine, impelled besieged lawmakers to slap the same 5-year sentence for possessing 500 grams of powder as it did for 5 grams of crack. But instead of reducing drug addiction and crime, those laws have swelled our prisons, fueled a racial divide that jails young Black men at disproportionate rates, left a generation of children fatherless, and driven up the costs of a justice system focused more on harsh punishment than rehabilitation.

No one condones the suffering inflicted on society by drug abuse and crime. But neither should we accept the needless devastation caused by disproportionately harsh drug laws. The numbers paint a grim picture: 500,000 of this country's 2.2 million prisoners are locked up for drug crimes, the majority on petty charges with no history of violence or high-level drug dealing. Caught in a cycle of poverty, crime and recidivism, it's no wonder that more than half of African American, male high school drop-outs have spent time in jail.

There are more effective and useful alternatives: treatment, for one, and better still, rescuing at-risk youth before they drop out of school and succumb to the allure of drugs and street life. To me, the growing incidents of dropouts, drugs, and crime are national security issues, threatening our ability to compete in the global economy. We cannot shortchange this, or future, generations and threaten our competitive standing in the world by allowing failing schools, sky-high dropout rates, an unskilled workforce, poverty, and hopelessness. We cannot afford to cede ground to countries like India and China, by allowing any of our youngsters to go astray while our standing in the world dwindles.

The policy of targeting crack cocaine users and sellers has diverted law enforcement's focus away from incarcerating drug kingpins who supply them. It seems to me there could be a more judicious allocation of resources at both ends of the drug pipeline: Choke off the flow of drugs before they reach small-time thugs on our streets and rehabilitate more of those who slip through the cracks. For them, the stigma of a prison sentence is a ticket to a career of crime. Jailing nonviolent offenders at these rates does little more than turn stupid kids who make stupid mistakes into expert criminals.

The Bush administration is attempting to blunt the Sentencing Commission's decision, relying, once more, on a politics of fear to stunt our progress. Attorney General Mukasey has suggested that the "sudden influx of criminals from federal prison into your communities could lead to a surge in new victims as a tragic, but predictable, result." That fear is not borne out of by the facts. Most of the prisoners eligible

for sentence reductions are low-level dealers, addicts, carriers. Every individual release or reduction is subject to judicial review, the process will be staggered over 30 years, and $1 billion in prison costs will be spared.

The status quo in federal sentencing has proven anathema to racial justice, in effect if not intent: Blacks account for 38 percent of drug arrests and 59 percent of convictions, although they are only 13 percent of drug users. Excessively punitive mandatory minimums are fueling that racial gap, targeting minority communities where crack cocaine is the drug of choice. The disparity is 100-to-1—and an average difference of 40 months in jail time—for two drugs experts say have no significant differences. Well, here's one significant difference: Over 80 percent of sentenced crack offenders are Black.

Correcting uneven punishment for nearly identical offenses has nothing to do with clemency for crack traffickers and users. It has everything to do with equality before the law. The smartest approach employs good sense; the most moral approach employs compassion. The very best approach employs both

Mr. SCOTT. Thank you very much, Mr. Rangel.

You are a Member of the Subcommittee, so you will be coming back anyway. Could we accommodate Mr. Bartlett at this time? Thank you.

TESTIMONY OF THE HONORABLE ROSCOE G. BARTLETT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. BARTLETT. Thank you very much for the opportunity to share my views with you today concerning the 100:1 crack versus powder cocaine disparity. I recognize in 2002 that this ratio that had been adopted in haste and driven by fear was not justified by the facts. I thought that on its face it was clearly discriminatory and not something that a rational society should be supporting.

I recognize that this disparity, which discriminated against lower income individuals, who more often used crack, was not justified by the effects of crack compared to powder cocaine, and I introduced a bill to address it. Since then, more evidence has accumulated to strengthen my conviction. I am here today to specifically welcome and support the position of the National District Attorneys Association that sentencing disparity should be reduced or eliminated. I welcome this hearing. I hope that Congress will follow the recommendations of numerous authorities and approve reducing or eliminating this ratio.

This past December the U.S. Sentencing Commission unanimously voted to reduce retroactively lengthy sentences meted out to thousands of people convicted of crack cocaine related offenses over the past two decades. That same month the U.S. Supreme Court ruled that a Federal judge hearing a crack cocaine case may consider the disparity between the guidelines treatment of crack and powder offenses.

I would like to note that we represent one person out of 22 in the world, and out of the three million prisoners in the world, we have 2.1 million of them. On its face that would appear to indicate that we are far and away the most lawless society in the world. I don't think that is true, and I think that what this really mandates is a fresh look at our criminal justice system and why one out of every 150 of us is in jail. That doesn't appear in any other major country in the world.

Most of these decisions reflect a growing concern that there should not be a 100:1 ratio in the amounts of powder cocaine and

crack cocaine that trigger mandatory minimum sentences. We now have more and better information than we did in the past in order to assess the ratio and make adjustments. Any changes to ratio must be based on empirical data.

I am a scientist and have a Ph.D. in human physiology, where there is substantially more evidence that we have now that a 100:1 unequal treatment is not justified. Our laws should reflect the evidence of harm to society. If we argue the justice ratio, we would be clinging to fear instead of facts.

There should be bipartisan support for the adjustment in the ratio. The law places great value in maintaining precedent, but precedent based on fear should not be protected.

I am also an engineer. As an engineer I know that in order to make improvements, we should be in a constant state of re-examination. The past good faith reasons for the 100:1 disparity cannot be justified by the current evidence that has accumulated. Politics and the law must catch up to scientific evidence.

In 2002 I introduced a bill to eliminate the disparity in sentencing between crack and powder cocaine with regard to trafficking, possession, importation and exportation of such substances by changing the applicable amounts for powder cocaine to those currently applicable for crack cocaine.

I introduced it several times since then. Now we have even more substantial evidence and support for addressing disparities in the law regarding crack and powder cocaine than we did then. Joe Cassilly, state's attorney for Harford County in my district, will address the evidence and put forth reasons that a certain myth should be dispelled.

A 100:1 ratio cannot be justified by evidence. Congress should not support the status quo. I hope that my colleagues will not allow the pursuit to prevent the potential adoption of a compromise that would reduce the unjustified current 100:1 disparate ratio of the treatment of crack compared to powder cocaine.

Thank you very much for your efforts on behalf of the Congress to address the goal of justice in our society. Thank you.

[The prepared statement of Mr. Bartlett follows:]

PREPARED STATEMENT OF THE HONORABLE ROSCOE G. BARTLETT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

"Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity"
Subcommittee on Crime, Terrorism & Homeland Security
House Committee on Judiciary
United States House of Representatives
Testimony of Congressman Roscoe G. Bartlett
February 26, 2008

Thank you for the opportunity to share my views with you today concerning the 100-1 Crack vs. Powder Cocaine Disparity. I recognized in 2002 that this ratio that had been adopted in haste and driven by fear was not justified by the facts. I recognized that this disparity which discriminated against lower income individuals who more often use crack was not justified by the effects of crack compared to powder cocaine and I introduced a bill to address it. Since then, more evidence has accumulated to strengthen my conviction. I am here today to specifically welcome and support the position by the National District Attorneys Association that the sentencing disparity should be reduced. I welcome this hearing. I hope that Congress will follow the recommendations of numerous authorities and approve reducing this ratio.

This past December, the U.S. Sentencing Commission unanimously voted to reduce retroactively lengthy sentences meted out to thousands of people convicted of crack cocaine-related offenses over the past two decades. That same month, the U.S. Supreme Court ruled that a federal judge hearing a crack cocaine case "may consider the disparity between the Guidelines' treatment of crack and powder offenses."

Both of these decisions reflect a growing concern that there should not be a 100:1 ratio in the amounts of powder cocaine and crack cocaine that trigger mandatory minimum sentences. We now have more and better information than we did in the past in order to assess the ratio and make adjustments. Any changes to the ratio must be based on empirical data. I am a scientist; I have a Ph.D. in human physiology. With the substantially more evidence that we have now, the 100-1 unequal treatment is not justified. Our laws should reflect the evidence of harm to society. If we don't adjust this ratio by reducing it, we would be clinging to fear instead of facts.

There should be bipartisan support for the adjustment in the ratio. The law places great value on maintaining precedent, but precedent based on fear should not be protected. I am also an engineer. As an engineer, I know that in order to make improvements, we should be in a constant state of reexamination. The past good faith reasons for the 100-1 disparity cannot be justified by the current evidence that has accumulated. Politics and the law must catch up to scientific evidence.

In 2002, I introduced a bill to eliminate the disparity in sentencing between crack and powder cocaine, with regard to trafficking, possession, importation, and exportation of such substances, by changing the applicable amounts for powder cocaine to those currently applicable to crack cocaine. I introduced it several times since then. Now, we have even more substantial evidence and support for addressing disparities in the law regarding crack and powder cocaine than we did then.

Joseph Cassilly, State's Attorney for Harford County, in my district, will address the evidence and put forth reasons that certain myths should be dispelled. The 100:1 ratio cannot be justified by evidence. Congress should not support the *status quo*. I hope that my colleagues will not allow the pursuit of the perfect to prevent the potential adoption of a compromise that would reduce the unjustified current 100-1 disparate ratio in the treatment of crack compared to powder cocaine. I thank you for your efforts on behalf of the Congress to advance the goal of justice in our society.

Mr. SCOTT. Thank you very much.

We have about 5 minutes. We have several votes, so it will be approximately 20 to 30 minutes before we reconvene, but we will reconvene as soon as we can possibly get back.

[Recess.]

Mr. SCOTT. The Subcommittee will come to order. We had a couple of procedural votes that we did not expect, so I apologize for the delay. When we recessed, we were about to hear the testimony from the representative of the 18th district of Texas, a Member of the Judiciary Committee and the sponsor of H.R. 4545, Ms. Jackson Lee.

TESTIMONY OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Ms. JACKSON LEE. Thank you very much, Mr. Chairman and to the Ranking Member. Thank you for this crucial hearing and as well an opportunity to understand one of the parables in the bible, "Blessed are the merciful, for they shall receive mercy."

For many in the criminal justice system, it is believed that mercy is not the defining aspect of criminal justice. But I offer to you a pictorial perspective of Lady Justice and the scales of justice. That pictorial depiction suggests that in fact a balance in justice is important.

So clearly a 100:1 ratio in the disparities between crack cocaine sentencing is not just. It is not merciful. It is not real. And I am delighted to be joined by Congressman Bartlett and Congressman Rangel, which shows a bipartisan support in opposition to what has been an unjust system.

This legacy started with Len Bias's death in the 1980's, an outstanding athlete. I remember the enormous amount of sympathy poured out for this young, bright man who had the potential of making millions of dollars as a Boston Celtic. Congress then moved to address his life and his legacy through what has now become a very harsh example of what and how you treat young people who may have gone astray of the law.

My legislation, hopefully, will put us back on track and really captures the theme that refutes much of the statements that have been made that suggest that we are trying to let criminals out. That is not what this legislation intends to do.

It intends to fix a broken system, because what is really needed is that this system is bogged down by low-level cases and in fact the Justice Department, the U.S. Attorneys offices take pride in how many notches in their belt they can show, how many small-time convictions. But yet the big potatoes, the kingpins, the cartels are left to their own devices.

Mr. Chairman, let me acknowledge a good friend of mine that is in the audience, Keith Branch from Houston, Texas, who has worked for years in juvenile probation and has seen first-hand the unbalanced scales of justice.

And so today I hope to briefly articulate the simple premise of this legislation. And again, I thank you for convening the hearing dealing with the disparity in sentencing for possession of powder cocaine and the simple possession of crack cocaine.

In December 2007, I introduced H.R. 4545, the Drug Sentencing Reform in Cocaine Kingpin Trafficking Act of 2007, so that we may finally eliminate the unjust and unequal Federal crack cocaine sentencing disparity in America. The time has come to finally right the wrongs created with the original drug sentencing legislation that I have mentioned that was passed in 1986.

I am glad that this is a companion bill to Senator Biden in the Senate, and the deliberations that generated this legislation really were premised on the question of balance and mercy.

As a senior Member of the full Judiciary Committee and a Member of the Subcommittee on Crime, I have always viewed this as a crucial issue. For the last 21 years, we have allowed people who have committed similar crimes to serve drastically different sentences for what we now know are discredited and unsubstantiated differences.

For the last 21 years, the way we have punished low-level crimes for crack cocaine and powder cocaine have been unjust and unequal and a waste of the Nation's criminal justice resources. Why? Because the kingpins are still running amok.

In 1986, Congress linked mandatory minimum penalties to different drug quantities, which were intended to serve as proxies for identifying offenders who were serious traffickers, managers of retail drug trafficking, and major traffickers, manufacturers or the kingpins who headed drug organizations. It did not work.

Since 1986, the severity of punishment between those sentenced for crack cocaine offenses and powder cocaine offenses has been extremely disproportionate, a 100:1 ratio to be exact. This has resulted in not only an unequal and unjust criminal justice system, but also a prison system which is overflowing and overburdened with individuals who were not in actuality major drug traffickers.

I agree with Mr. Gohmert. This should not be a racial issue. And if those who were experiencing the disparity were 100 percent Asian, 100 percent Caucasian, 100 percent Latinos, I would be just as outraged by this inequity.

And I think the U.S. Sentencing Commission that recently issued a report unanimously and strongly urging the Congress to, one, act swiftly to increase the threshold quantities of crack cocaine to trigger the 5-and 10-year minimum sentences so that Federal resources are focused on major drug traffickers as intended in the original 1986 legislation and to repeal the mandatory minimum penalty sentence for simple possession, the only controlled substance for which there is a mandatory minimum for a first time offense of simple possession.

They themselves recognize that this is not a racial issue, even though the burden of sentencing falls upon African Americans. It is a justice issue.

Moreover, numerous reputable studies comparing the usage of powder and crack cocaine have shown that there is little difference between the two forms of the drug, which fundamentally undermines the current quantity-based sentencing disparity.

Accordingly, this legislation is supported by the recommendations of the Sentencing Commission and also the U.S. Supreme Court decisions—two opinions in the 7-2 decisions in early December, restoring the broad authority of Federal district court judges

to sentence outside the sentencing guidelines range and impose shorter and more reasonable prison sentences for persons convicted of offenses involving crack cocaine.

However, it does impact on our U.S. Department of Justice or the U.S. attorneys, who I believe have publicly said that the law is still the law, and they will still prosecute in that format.

In the most high-profile of the cases, *Kimbrough v. United States*, the court held that sentencing judges could sentence crack cocaine defendants below the guidelines range to reflect a view that crack sentences have been set disproportionately high in comparison to cocaine sentencing—again, recognizing the disparity.

Additionally, the U.S. Sentencing Commission has been urging Congress to drop its 100:1 crack-to-cocaine ratio approach, and the court held that judges may take into account the evolving view that both drugs merit equal treatment when calculating prison time.

It is time for Congress to act. The bill that I have offered will eliminate the disparities in cocaine sentencing and the current mandatory minimum for simple possession. In addition, this bill will increase emphasis on certain aggravating and mitigating factors, create an offender drug treatment incentive grant program and increase penalties for major drug traffickers—what we were originally focused on doing.

As I indicated, this bill is already filed in the Senate. Most importantly, this particular legislation will enact the measures that the U.S. Sentencing Commission has requested from Congress. It is long overdue.

This legislation will also fundamentally change the way we punish drug traffickers. This legislation dramatically increases the monetary punishment for those convicted of trafficking drugs and at the same time creates grants for states to create incentive based treatment programs for low-level drug offenders. That is the way that we should go.

Blatant and unjust inequality under the law must end. This bill will ensure that those individuals who have violated the law will be punished fairly relative to the punishment. We cannot allow this injustice to continue, and this bill does not let people out without guidelines.

It is legislation that is balanced and supported by a number of organizations, including the Sentencing Project, the ACLU, the American Bar Association, the Drug Policy Alliance, and the Open Society Policy Center.

I also want to ensure that this legislation does recognize the value of Second Chance.

Let me conclude, Mr. Chairman, by simply saying that we have an enormous burden. There are thousands of individuals incarcerated under the unfairness of this system, and I believe that in keeping with the tenets expressed by the pictorial depiction of Lady Justice, we have failed, and we have not kept up with those principles.

And therefore, this legislation allows us to do so, in addition to H.R. 261, which I hope we will have a hearing on, that expresses the desire to allow non-violent offenders to be released after serving a certain amount of time. It relates to the overcrowding of our jails with most of these crack cocaine defendants.

So I ask my colleagues to consider this legislation. I look forward to changing the legacy of Len Bias in ensuring that there is fairness in our system and as well to ensure that we provide rehabilitative measures to those who have lost their way in the usage of crack and focus our efforts on ensuring that king traffickers are put in jail, but more importantly, that we address the drug question in America with mercy.

With that, I yield back, and I ask that my entire statement may be submitted into the record.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, COMMITTEE ON THE JUDICIARY

Thank you, Mr. Chairman, for your leadership in convening today's very important hearing on the disparity in sentencing for possession of powder cocaine and the simple possession of crack cocaine. I would also like to thank the ranking member, the Honorable Louie Gohmert, and welcome our panelists. I look forward to their testimony.

In December 2007, I introduced H.R. 4545 "The Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007" so that we may finally eliminate the unjust and unequal federal crack/cocaine sentencing disparity in America. The time has come, to finally right the wrongs created with the original drug sentencing legislation in 1986.

As a senior Member of the Full Judiciary Committee and a member of the Subcommittee on Crime, I have always been an outspoken advocate for justice and equality in our criminal justice system. For the last 21 years, we have allowed people who have committed similar crimes to serve drastically different sentences for what we now know are discredited and unsubstantiated differences. For the last 21 years, the way we have punished low-level crimes for crack cocaine and powder cocaine have been unjust and unequal.

In 1986, Congress linked mandatory minimum penalties to different drug quantities, which were intended to serve as proxies for identifying offenders who were "serious" traffickers (managers of retail drug trafficking) and "major" traffickers (manufacturers or the kingpins who headed drug organizations).

Since 1986, the severity of punishment between those sentenced for crack cocaine offenses and powder cocaine offenses has been extremely disproportionate, 100 to 1 ratio to be exact. This has resulted in not only an unequal and unjust criminal justice system, but also a prison system which is overflowing and overburdened with individuals who were not in actuality major drug traffickers.

The U.S. Sentencing Commission recently issued a report that unanimously and strongly urged Congress to: (1) act swiftly to increase the threshold quantities of crack necessary to trigger the five- and ten-year mandatory minimum sentences so that federal resources are focused on major drug traffickers as intended in the original 1986 legislation; and (2) repeal the mandatory minimum penalty sentence for simple possession of crack, the only controlled substance for which there is a mandatory minimum for a first time offense of simple possession. The Sentencing Commission also unanimously rejected any effort to increase penalties for powder since there is no evidence to justify any such upward adjustment.

Moreover, numerous reputable studies comparing the usage of powder and crack cocaine have shown that there is little difference between the two forms of the drug, which fundamentally undermines the current quantity-based sentencing disparity.

I introduced H.R. 4545 "The Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007" after the U.S. Supreme Court released two opinions in 7–2 decisions in early December 2007. These decisions restored the broad authority of federal district court judges to sentence outside the Sentencing Guidelines range and impose shorter and more reasonable prison sentences for persons convicted of offenses involving crack cocaine. In the most high-profile of the cases, *Kimbrough v. United States*, the Court held that sentencing judges could sentence crack cocaine defendants below the Guidelines range to reflect a view that crack sentences have been set disproportionately high in comparison to cocaine sentences.

Additionally, the U.S. Sentencing Commission has been urging Congress to drop its 100–1 crack-to-cocaine ratio approach, and the Court held that judges may take into account the evolving view that both drugs merit equal treatment when calculating prison time.

It is time for Congress to act. H.R. 4545 will eliminate the disparities in cocaine sentencing and the current mandatory minimum for simple possession. In addition, this bill will increase emphasis on certain aggravating and mitigating factors, create an offender drug treatment incentive grant program and increase penalties for major drug traffickers. This bill complements the bill recently introduced in the Senate by Senator Biden. Most importantly, this resolution will enact the measures that the U.S. Sentencing Commission has requested from Congress.

This legislation will also fundamentally change the way we punish drug traffickers. This legislation dramatically increases the monetary punishment for those convicted of trafficking drugs at the same time creates grants for states to create incentive based treatment programs for low-level drug offenders.

H.R. 4545 amends the Controlled Substances Act and the Controlled Substances Import and Export Act to increase the amount of a controlled substance or mixture containing a cocaine base (*i.e.,* crack cocaine) required for the imposition of mandatory minimum prison terms for crack cocaine trafficking to eliminate the sentencing disparity between crack and powder cocaine.

Section 4 of H.R. eliminates the 5-year mandatory minimum prison term for first time possession of crack cocaine.

Section 5 provides increase emphasis on certain aggravating and mitigating factors as a means of sentence enhancement.

Section 6 directs the Attorney General to make grants to improve drug treatment to offenders in prison, jails, and juvenile facilities. H.R. 4545 authorizes $10 million dollars to carry out drug improvement.

Section 7 provides grants to demonstration programs to reduce drug use among substance abusers. H.R. 4545 authorizes $5 million dollars for each of FY08 and 09.

Section 8 provides emergency authority for the United States Sentencing Commission to provide amendments to take effect on the same date as the amendments made by this Act.

Section 9 provides for increased penalties for major drug traffickers.

Lastly, H.R. 4545 has a prospective effective. The amendments made by this Act shall apply to any offense committed on or after 180 days of enactment of H.R. 4545.

Blatant and unjust inequality under the law must end. This bill will ensure that those individuals who have violated the law will be punished fairly relative to the punishment. We cannot allow this injustice to continue, and I urge you to support this timely resolution which is supported by the Open Society Policy Center, the Sentencing Project, the ACLU, the American Bar Association, and the Drug Policy Alliance. I also want to thank Senator Biden for introducing the companion to this legislation in the Senate earlier this year.

I would be remiss if I did not mention H.R. 261 that I introduced early last year. H.R. 261, is the "Federal Prison Bureau Nonviolent Offender Relief Act of 2007". This Bill provides for the early release of non-violent offenders who have attained the age of at least 45 years of age, have never been convicted of a violent crime, have never escaped or attempted to escape from incarceration, and have not engaged in any violation, involving violent conduct, of institutional disciplinary regulations.

H.R. 261 seeks to ensure that in affording offenders a second chance to turn around their lives and contribute to society, ex-offenders are not too old to take advantage of a second chance to redeem themselves. A secondary benefit of H.R. 261 is that it would relieve some of the strain on federal, state, and local government budgets by reducing considerably government expenditures on warehousing prisoners.

The number of federal inmates has grown from just over 24,000 in 1980 to 173,739 in 2004. The cost to incarcerate these individuals has risen from $330 million to $4.6 billion since 2004. At a time when tight budgets have forced many states to consider the early release of hundreds of inmates to conserve tax revenue and when our nation's Social Security system is in danger of being totally privatized, early release is a common-sense option to raise capital.

There are more people in the prisons of America than there are residents in states of Alaska, North Dakota, and Wyoming combined. Over one million people have been warehoused for nonviolent, often petty crimes.

The European Union, with a population of 370 million, has one-sixth the number of incarcerated persons as we do, and that includes violent and nonviolent offenders. This is one third the number of prisoners which America, a country with 70 million fewer people, incarcerates for nonviolent offenses.

To be sure, both of these pieces of legislation will bring much needed reform to our criminal justice system. We must act with urgency and the time is now.

Thank you, Mr. Chairman. I yield the remainder of my time.

Mr. SCOTT. Thank you. Thank you.

Our second panel begins with Judge Reggie Walton, who assumed his position as the United States district court judge for the District of Columbia in 2001. He was also appointed by President Bush in 2004 to serve as the chairperson of the National Prison Rape Elimination Commission, a commission created by the United States Congress and tasked with the mission of identifying methods to curb the incidence of prison rape. He is also a member of the Federal judiciary's criminal law committee and as of May 2007 began a 7-year appointment with the U.S. Foreign Intelligence Surveillance Act court.

Our second witness will be Judge Ricardo Hinojosa, who has served on the U.S. Sentencing Commission since 2003. He was appointed to chair that commission in 2004. Before joining the judiciary, he served as an adjunct professor at the University of Texas Law School and was a partner in a local law firm.

Our third witness will be introduced by the gentleman from North Carolina.

Mr. COBLE. Thank you, Mr. Chairman. I have been here, there and yonder, and thank you for your understanding.

I am delighted to welcome my fellow North Carolinian, who is the United States attorney for the western district of North Carolina, Ms. Gretchen Shappert.

Good to have you with us.

Thank you, Mr. Chairman.

Mr. SCOTT. Thank you. Ms. Shappert is U.S. attorney for the western district of North Carolina, served as assistant U.S. attorney in the office for 14 years, and before that was an assistant district attorney in Mecklenburg County, North Carolina, for 2 years.

Our next witness is Joseph Cassilly, state's attorney for Harford County, Maryland, since 1982 and has been re-elected six times. He is active in the Maryland State Attorneys Association and president elect of the National District Attorneys Association and is on the board of directors of that organization.

Our fifth witness is Michael Short, who is one of several young men, many of whom have been childhood friends growing up in suburban Maryland, who were involved in a crack cocaine conspiracy. He was sentenced to 20 years in prison for delivering a package containing 63 grams of crack to an undercover special agent. After serving 15 years in prison, President Bush commuted his sentence in December 2007. While incarcerated, he earned his associates degree in business management from Park College, graduating in 1995 with a 3.17 GPA.

Our last, but not least, will be Michael Nachmanoff, the public defender for the eastern district of Virginia. His office has 52 employees and represents more than 2,200 defendants in Federal court every year in Alexandria, Richmond, Norfolk and Newport News. He has been with the office since it was established 6 years ago. He served as first assistant Federal public defender for 3 years and acting public defender for 2 years before formally assuming the job as the lead of that agency in February of 2007. He had the honor of auguring and winning the *Kimbrough v. United States* case in the U.S. Supreme Court, which Ms. Jackson Lee referenced.

Each of our witnesses' written statements will be entered into the record in its entirety, and I ask that each witness summarize his or her testimony in 5 minutes or less. And to help stay within that time limit, we have lighting devices right here and on the desk. When you start with green, go to yellow with 1 minute left, and red when the time is up. And we would ask you to begin wrapping up.

Judge Walton?

TESTIMONY OF THE HONORABLE REGGIE B. WALTON, JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, WASHINGTON, DC

Judge WALTON. Thank you, Mr. Chairman.

Members of the Subcommittee, it is an honor to have the opportunity to appear before you to address what I believe is one of the most important criminal justice issues that this country is confronting today.

As a former prosecutor in the United States attorney's office, who vigorously prosecuted cases, and as a judge who is not known as being lenient on criminals, I nonetheless believe that we have to address what I believe is a pervasive problem that is adversely impacting the credibility that many people have in our criminal justice system.

I am proud to be a member of the Federal judiciary and proud to be a member of the Judicial Conference, which has taken a position in opposition to the 100:1 disparity that now exists in reference to crack cocaine.

I seldom speak out in reference to injustices that exist within our system, because I basically believe in our system. I believe we have devised the best system that mankind has been able to devise, but that doesn't mean there are not imperfections, and I believe that the 100:1 disparity is one of those problems that needs to be addressed.

I, too, as Senator Biden indicated when I testified several weeks before him, as a member of the first Bush administration drug office, took a position in favor of some level of disparity between crack and powder cocaine, because, based upon the information provided to us at that time, it was believed that they were different substances and that they did in fact have a different impact as far as addiction rates were concerned, the impact they had on the fetus, and the violence related to that activity.

We now know, however, that as far as the chemical makeup of powder and crack, they basically are the same substance. We know that, in and of themselves, the two are not different as it relates to the addiction qualities. We know, however, that because crack is smoked, it may have a greater potential addiction level, but we know that as far as substances are concerned, that they basically are the same.

And as far as the violence is concerned, yes, there is violence related to all drugs, but I don't think there is really significant evidence that would suggest that there is a significantly greater level of violence related to crack cocaine as compared to powder cocaine, PCP and other substances that are ravishing many of our communities.

I think the time has come to address this problem, because I think that in many segments of American society, it is felt that the system is not fair. It is not good for a system of laws when you have people who come at the behest of the court system to serve as jurors, who refuse to serve because they believe the system is unfair.

It is not, I think, good for our system to have people summoned to come and serve as jurors, who sit on juries and refuse to convict, because they believe the system is unfair because of this 100:1 disparity.

I really believe that the time has come to address this problem. I am proud to be, as I say, a member of the judiciary, and one of the things I find encouraging about our country is that historically when we have made mistakes—and we do make mistakes; to be human is to make errors—but we have to be big enough to admit that we have made errors, and we have to be willing to step up to the plate and correct those problemss.

I have no problem putting people in prison. That is my job. And I think when people do crime, they should be punished. But I think the punishment has to be fair, and I believe the punishment has to be perceived to be fair. The unfortunate reality is that there are many people, and many of those people exist in African American communities who believe the system is not fair.

I know that these laws were not enacted with racial motivation, but people nonetheless believe that there is a racial implication underlying what is taking place because of the disparity, and I don't, again, think that is good for our system of justice.

So in concluding, I would ask that this Subcommittee and the Congress as a whole seriously think about addressing this problem, because I think when it is addressed, it will bring confidence back into the system of justice that exists in America.

Thank you.

[The prepared statement of Judge Walton follows:]

PREPARED STATEMENT OF THE HONORABLE ROSCOE B. WALTON

JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF

JUDGE REGGIE B. WALTON
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BEFORE

THE SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

FOR A HEARING ENTITLED

"CRACKED JUSTICE - ADDRESSING THE UNFAIRNESS IN COCAINE SENTENCING"

February 26, 2008

Thank you for affording me the opportunity to appear before you today on behalf of the Judicial Conference of the United States and to convey my own experience and perspectives on this very important matter. The disparity between sentences imposed for powder-form cocaine and cocaine base ("crack") is one of the most serious challenges facing the federal criminal justice system today, and I am grateful for the chance to share the views of the courts.

Most informed commentators now agree that the infamous 100-to-1 ratio between crack and powder is unwarranted,[1] but legislative remedies have proved elusive. Some believe that the answer lies in reducing the penalties associated with crack; others believe that the answer lies in increasing the penalties associated with powder; others believe that the penalties associated with powder should be increased *and* that crack penalties should be reduced. Any of these approaches, if adopted by Congress, will have reverberating consequences for the criminal justice system: while the Sentencing Commission estimates that there are 19,500 inmates eligible for sentence reduction, there are more than 26,383 inmates in the custody of the Bureau of Prisons whose offenses involved crack[2] (approximately 13 percent of the total prison population).[3]

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[1]*See* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2007) [hereafter, U.S. SENTENCING COMM'N, 2007 REPORT].

> Federal cocaine sentencing policy, insofar as it provides substantially heightened penalties for crack cocaine offenses, continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups, and inaction in this area is of increasing concern to many, including the Commission.

Id. at 2.

[2]*See* U.S. SENTENCING COMM'N, *Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive* (Oct. 3, 2007), *available at* http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf.

[3]Federal Bureau of Prisons, Inmate Population as of December 29, 2007, was 199,616 http://www.bop.gov/news/quick.jsp. In 2006, there were 5,397 individuals sentenced in federal

In recent years, the disparity between crack and powder cocaine sentences is a subject that has captured the attention of the Criminal Law Committee (of which I am a member) and the Judicial Conference. In June 2006, the Criminal Law Committee discussed the fact that 100 times as much powder cocaine as crack is required to trigger the same five-year and ten-year mandatory minimum penalties, resulting in crack sentences that are 1.3 to 8.3 times longer than their powder equivalents.[4] The Committee concluded that the disparity between sentences was unsupportable, and that it undermined public confidence in the courts. Upon the Committee's recommendation, in September 2006, the Judicial Conference voted to "oppose the existing differences between crack and powder cocaine sentences and support the reduction of that difference."[5] I conveyed that view on behalf of the Criminal Law Committee at a Sentencing Commission hearing on cocaine sentencing policy in November 2006.[6] In 2007, the Sentencing Commission, implementing the policy conclusions that follow from its series of special congressional reports on cocaine and sentencing policy,[7] amended downward the guideline for

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courts for crack, compared to 5,744 sentenced for powder cocaine. Between 1996 and 2006, the number of sentenced crack offenders ranged from 4,350 to 5,397. U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 1, at 12 (Figure 2-1).

[4]*See* U.S. Department of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* 19 (Mar. 17, 2002), *available at* http://www.usdoj.gov/olp/cocaine.pdf/crack_powder2002.pdf

[5]JCUS-SEP 06, p. 18.

[6]*Public Hearing on Cocaine Sentencing Before the U.S. Sentencing Comm'n* 103-111 (Nov. 14, 2006) (testimony of Judge Reggie B. Walton), *available at* http://www.ussc.gov.

[7]The Commission has repeatedly condemned the crack-powder disparity in its reports to Congress. *See, e.g,.* U.S. SENTENCING COMM'N, 1995 SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (Feb. 1995); U.S. SENTENCING COMM'N, 1997 SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (Apr. 1997); U.S. SENTENCING COMM'N, 2002

crack cocaine.[8] And Congress, with virtually no debate or opposition, permitted the amendment to move forward and become effective on November 1, 2007.

Soon thereafter, I testified before the Commission on the issue of retroactive application of its guideline amendment for crack.[9] The Criminal Law Committee of the Judicial Conference recommended that the amendment should be made retroactive,[10] and on December 11, 2007, the Commission voted unanimously to apply the guideline retroactively.[11] This was a courageous and promising first step in ameliorating the disparity that exists between crack and powder sentences. But as the Commission itself acknowledges, the promulgation of the guideline amendment was only a partial solution to a much-larger problem, and the ultimate solution lies with Congress. I testified before the Senate Judiciary Committee's Subcommittee on Crime and Drugs on the issue of cocaine sentencing on February 12, 2008,[12] and am pleased to see the

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REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002); U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 1.

[8]Notice of Submission to Congress of Amendments to Sentencing Guidelines Effective November 1, 2007, 72 Fed. Reg. 28558 (May 21, 2007).

[9]*Public Hearing on Retroactivity Before U.S. Sentencing Comm'n* 14-20 (Nov. 13, 2007)(testimony of Judge Reggie B. Walton), *available at* http://www.ussc.gov.

[10]Letter from Judge Paul G. Cassell, Chair, Committee on Criminal Law of the Judicial Conference of the U.S., to Ricardo H. Hinojosa, Chair, U.S. Sentencing Comm'n (Nov. 2, 2007), *available at* http://www.ussc.gov.

[11]Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Comm'n Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec.11, 2007), *available at* http://www.ussc.gov.

[12]*Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity Before the Subcomm. on Crime and Drugs of the Senate Comm. on Judiciary,* 110th Cong. (Feb. 12, 2008)(testimony of Judge Reggie B. Walton), *available at* http://judiciary.senate.gov/pdf/08-02-12Crack-Powder-WaltonTestimony.pdf

House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security taking up this important issue, as well.

Congress established the crack-powder disparity with the passage of the Anti-Drug Abuse Act of 1986.[13] Legislative history suggests that it did so not out of contempt for the Sentencing Reform Act of 1984 (which, *inter alia*, sought to eliminate unwarranted sentencing disparity in the federal courts),[14] but because it held a particular set of beliefs about crack cocaine. For example, the record reflects Congress's concern that crack cocaine was uniquely addictive,[15] was associated with greater levels of violence than was powder cocaine,[16] and was especially damaging to the unborn children of users.[17]

I understand the circumstances under which Congress passed the 1986 Act because many

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[13]Pub. L. 99–570, 100 Stat. 3207 (1986).

[14]*See, e.g.*, 18 U.S.C. § 3553(a)(6)(2007) ("The Court, in determining the particular sentence to be imposed, shall consider...the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"); 28 U.S.C. § 991(b)(1)(B)(2007) ("The purposes of the United States Sentencing Commission are to...provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct").

[15]*See, e.g.*,. U.S. SENTENCING COMM'N, 2002 REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002) 93, *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm ("Crack cocaine can only be readily smoked, which means that crack cocaine is always in a form and administered in a manner that puts the user at the greatest potential risk of addiction.").

[16]*See, e.g., id.* at 100 ("An important basis for the establishment of the 100-to-1 drug quantity ratio was the belief that crack cocaine trafficking was highly associated with violence generally.").

[17]*See, e.g., id.* at 94 ("During the congressional debates surrounding the 1986 Act, many members voiced concern about the increasing number of babies prenatally exposed to crack cocaine and the devastating effects such exposure causes.").

of those same beliefs about crack cocaine were in force during the late 1980s, when I served as the White House's Associate Director of the Office of National Drug Control Policy. But twenty years of experience have taught us all that many of the beliefs used to justify the 1986 Act were wrong. Research has shown that the addictive properties of crack have more to do with the fact that crack is typically smoked than with its chemical structure.[18] The national epidemic of crack use that many of us feared never actually materialized,[19] and recent studies suggest that levels of violence associated with crack are stable or even declining.[20]

Because experience has shown that many of the foundations of the 1986 Act were flawed, and because the existing disparity may actually frustrate (instead of advance) the goals of the Sentencing Reform Act,[21] there is now widespread support by many in the United States to reduce the existing sentencing disparity between crack and powder cocaine.[22]

The federal courts must be fundamentally fair, but that is not enough: they must also be *perceived as fair* by the public. And today, that is not always the case. More than once, I have had citizens refuse to serve on a jury in my courtroom because they are familiar with the existing disparity between crack and powder sentences, and believed that federal statutes (and the courts

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[18]*See, e.g.*, U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 1, at 63 (linking risk of addiction to mode of administration).

[19]*See id.* at 72-76 (noting that use of crack has been very stable in recent years).

[20]*See id.* at 86-87 (reporting research showing declining levels of actual violence).

[21]*See id.* at 8 ("[T]he Commission maintains its consistently held position that the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act.").

[22]*See e.g., Public Hearing on Cocaine Sentencing Policy Before the U.S. Sentencing Comm'n* (Nov. 13, 2006) , *available at* http:www.ussc.gov

that interpret those statutes) are racist.

I do not believe that the 1986 Act was intended to have a disparate impact on minorities, but while African-Americans comprise approximately only 12.3 percent of the United States population in general,[23] they comprise approximately 81.8 percent of federal crack cocaine offenders, but only 27 percent of federal cocaine powder offenses.[24] (Hispanics, though, account for a growing proportion of powder cocaine offenders. "In 1992, Hispanics accounted for 39.8 percent of powder cocaine offenders. This proportion increased to over half (50.8%) by 2000 and continued increasing to 57.5 percent in 2006."[25]) Furthermore, because crack offenses carry longer sentences than equivalent powder cocaine offenses,[26] African-American defendants sentenced for cocaine offenses wind up serving prison terms that are greater than those served by other cocaine defendants.[27] I have a concern that disparate impact of crack sentencing on African-American communities shapes social attitudes. When large segments of the African-American population believe that our criminal justice system is racist, it presents the courts with

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[23]www.census.gov/main/www/cen2000.html (follow American Fact Finder; then follow Fact Sheet link).

[24]U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 1, at 15 ("Historically the majority of crack cocaine offenders are black, but the proportion steadily has declined since 1992: 91.4 percent in 1992, 84.7 percent in 2000, and 81.8 percent in 2006.").

[25]*Id.* at 15.

[26]*See supra* note 4 (noting crack sentences that are 1.3 to 8.3 times longer than their powder equivalents).

[27]*See, e.g.*, U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 1, at B-18 ("In 1986, before the enactment of the federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African Americans was 11 percent higher than for whites. Four years later, the average federal drug sentence for African Americans was 49 percent higher than for whites.").

serious practical problems. People come to doubt the legitimacy of the law–not just the law associated with crack, but *all* laws. I have experienced citizens refusing to serve on juries, and there are reports of juries refusing to convict defendants.[28] Skepticism about the judiciary also presents us with symbolic problems. The facade of the Supreme Court of the United States is an evocative image, an icon that connotes the rule of law. It is important that the federal courts are recognized as places in which the citizens stand as equals before the law. If, instead, some segments of the population view the courts with scorn and derision, as institutions that mete out unequal justice, the moral authority of the federal courts is dimmed.

The Judicial Conference strongly supports legislation to reduce the unsupportable sentencing disparity between crack and powder cocaine. The Criminal Law Committee and the Judicial Conference have no established view on whether the disparity should be reduced by raising penalties for powder, reducing penalties for crack, or through some combination of both approaches,[29] but Congress may find it prudent to reconsider whether existing minimum penalties are necessary to achieve the goals of sentencing. This would be consistent with the parsimony provision of the Sentencing Reform Act.[30]

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[28]*See* William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1282 (1996) ("Moreover, the 100:1 ratio is causing juries to nullify verdicts. Anecdotal evidence from districts with predominantly African-American juries indicates that some of them acquit African-American crack defendants whether or not they believe them to be guilty if they conclude that the law is unfair." (citing Jeffrey Abramson, *Making the Law Colorblind*, N.Y. TIMES, Oct. 16, 1995, at A15); Symposium, *The Role of Race-Based Jury Nullification in American Criminal Justice*, 30 J. MARSHALL L. REV. 911 (1997).

[29]For specific legislative recommendations, see, *e.g.*, U.S. SENTENCING COMM'N, 2007 REPORT, *supra* note 1, at 8-9.

[30]*See* 18 U.S.C. § 3553(a) (2007).

Although the Judicial Conference does not have an established view on how to reduce the disparity, it does have an established and longstanding opposition to mandatory minimum penalties.[31] For more than thirty years, it has been the view of the Judicial Conference that mandatory sentences unnecessarily prolong the sentencing process, increase the number of criminal trials and engender additional appellate review, and increase the expenditure of public funds without a corresponding increase in benefits.[32] Accordingly, as a general matter, the Conference favors legislation that leaves sentencing decisions to judges, those individuals best situated to apply general rules to the particular circumstances. Crack legislation that increases the drug weights required to trigger mandatory minimum penalties would be more consistent with Judicial Conference policy inasmuch as they narrow the pool of defendants subjected to mandatory minimum provisions.

All four of the bills before this Committee would reduce the sentencing disparity that exists between crack and powder cocaine. Congressman Roscoe Bartlett's bill, the "Powder-Crack Penalty Equalization Act of 2007,"[33] would do so by reducing the amount of powder cocaine required to trigger mandatory minimum penalties to the levels currently associated with crack cocaine. While this would presumably increase the population of defendants subjected to mandatory minimum penalties and would therefore be inconsistent with the Judicial

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[31] *See, e.g.*, JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, pp. 90, 93; JCUS-MAR 90, p. 16; JCUS-SEP 91, p. 56; JCUS-MAR 93, p. 13; JCUS-SEP 93, p. 46; JCUS-SEP 94, p. 42; JCUS-SEP 95, p. 47 (all opposing mandatory minimum sentences).

[32] JCUS-APR 76, p. 10; JCUS-SEP 81, pp. 90, 93.

[33] H.R. 79, 110th Cong. (2007).

Conference's position on mandatory minimum penalties,[34] it would redress the existing disparity between crack and powder.[35]

Congressman Charles Rangel's bill, the "Crack-Cocaine Equitable Sentencing Act of 2007,"[36] would treat the possession, trafficking, and importation of crack the same as the possession, trafficking, and importation of other forms of cocaine. Simple possession of crack would be treated like simple possession of powder; five grams of crack would be treated as five grams of powder; fifty grams of crack would be treated as fifty grams of powder. This approach, too, would reduce the sentencing disparity between crack and powder, as supported by the Judicial Conference,[37] and because in practice this approach would reduce the pool of defendants subjected to mandatory minimum penalties, it would also be consistent with the Judicial Conference's longstanding opposition to mandatory minimum sentences.[38]

Congresswoman Sheila Jackson-Lee's bill, the "Drug Sentencing Reform and Cocaine Kingpin Act of 2007,"[39] appears to be the analogue to Senator Joseph Biden's bill.[40] By increasing the drug weights required to trigger mandatory minimum penalties for crack, and by

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[34]*See supra* note 31 (outlining Conference opposition to mandatory minimum sentences).

[35]*See supra* note 5 and associated text (describing support of the Judicial Conference for reduction of the difference between crack and powder sentences).

[36]H.R. 460, 110th Cong. (2007).

[37]*See supra* note 5 and associated text (describing support of the Judicial Conference for reduction of the difference between crack and powder sentences).

[38]*See supra* note 31 (outlining Conference opposition to mandatory minimum sentences).

[39]H.R. 4545, 110th Cong. (2007).

[40]S. 1711, 110th Cong. (2007).

eliminating the mandatory minimum for simple possession, the bill both would reduce the disparity between crack and powder sentences and would winnow the pool of defendants subjected to mandatory minimum penalties.[41] The bill's focus on aggravating and mitigating factors is consistent with the Judicial Conference's general view that judges should have discretion in sentencing matters, tailoring the terms of sentences to the specific circumstances of individual cases.[42]

Like Congressman Rangel's and Congresswoman Jackson-Lee's bills, Subcommittee Chairman Scott's bill, the "Fairness in Cocaine Sentencing Act of 2008,"[43] would eliminate increased penalties for crack, reducing the disparity between crack and powder sentences. As noted above, this would be consistent with the policy of the Judicial Conference.[44] Subcommittee Chairman Scott's bill would also eliminate all mandatory minimum penalties for cocaine offenses that were established by section 401(b)(1)(A) of the Controlled Substances Act. This provision would square neatly with the Conference's longstanding and unqualified opposition to mandatory minimums.[45] Additionally, Subcommittee Chairman Scott's bill would authorize funds to the Administrative Office of the United States Courts to provide pretrial

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[41]*See supra* note 5 and associated text (describing support of the Judicial Conference for reduction of the difference between crack and powder sentences), *supra* note 31 (outlining Conference opposition to mandatory minimum sentences).

[42]*See* JCUS-SEP 95, p. 47 (Recommendation 30 of the Long Range Plan for the Federal Courts).

[43]H.R. 5035, 110th Cong. (2008).

[44]*See supra* note 5 and associated text (describing support of the Judicial Conference for reduction of the difference between crack and powder sentences).

[45]*See supra* note 31 (outlining Conference opposition to mandatory minimum sentences).

diversion and post-conviction drug courts for federal defendants charged with illegal use of controlled substances. The Judicial Conference has generally opposed the establishment of specialized courts within the judicial branch.[46] The Conference's view is guided by the understanding that federal district courts are intended to be courts of general jurisdiction. This, however, should not imply a rejection of drug court principles in particular.[47] Several district courts have drawn upon the existing research literature and applied drug court principles in the management of their dockets, and other courts in the federal system are currently studying the principles of drug courts.

I would like to thank you for the opportunity to testify before you today. The disparity in crack and powder sentences is an important issue with both symbolic and practical consequences for the federal courts. I believe that existing cocaine policy in general, and the 100-to-1 ratio in particular, has a corrosive effect upon the public's confidence in the federal courts. As a representative of the Judicial Conference and as a sentencing judge who is regularly called upon to impose sentences on crack defendants, I encourage Congress to pass legislation that would reduce the disparity between crack and powder cocaine sentences.

Thank you for your attention and I would be happy to answer any questions.

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[46]*See* JCUS-SEP 62, p. 54; JCUS-SEP 86, p. 60; JCUS-SEP 90, p. 82 (all expressing opposition to proposals to establish specialized courts); *see also* JCUS-SEP 95, p. 46 (Recommendation 24 of the Long Range Plan for the Federal Courts–stating a preference for generalist courts except in certain limited contexts).

[47]Research from state court systems suggests that drug courts can be cost-effective tools in reducing recidivism. *See, e.g.*, Steve Aos, Marna Miller, and Elizabeth Drake, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates,* WASH. STATE INST. PUB. POLICY, Oct. 2006, at 9 (suggesting that drug courts reduce recidivism by approximately 8%, at a net social savings of $4,767 per participant), *available at* http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf.

Mr. SCOTT. Thank you very much, Judge Walton.
Judge Hinojosa?

TESTIMONY OF THE HONORABLE RICARDO H. HINOJOSA, CHAIR, UNITED STATES SENTENCING COMMISSION, WASHINGTON, DC

Judge HINOJOSA. Chairman Scott, Ranking Member and Texas Aggie fan Gohmert, Members of the Subcommittee, I appreciate the opportunity to appear before you today.

The United States Sentencing Commission, a bipartisan body, has been considering cocaine sentencing issues for a number of years and has worked closely with Congress to address the sentencing disparity that exists between the penalties for powder and crack cocaine offenders.

Although the commission took action this past year to address some of the disparity existing in the sentencing guideline penalties for crack cocaine offenses, the commission is of the opinion that any comprehensive solution to the problem of Federal cocaine sentencing policy requires revision of the current statutory penalties and therefore must be legislated by Congress.

The commission encourages Congress to take legislative action on this important issue, and it views today's hearing as an important step in that process. As you are aware, in May 2007 the commission issued its fourth report to Congress on Federal cocaine sentencing policy. My written statement for today's hearing contains highlights from our 2007 report, as well as updated preliminary data from fiscal year 2007.

In the interest of time, I will briefly cover some of the information that is contained in the written statement.

In preliminary fiscal year 2007 data, we see a continuation of trends we have seen with respect to crack cocaine and powder cocaine offenses. The commission obtained information on 6,175 powder cocaine cases, which represent approximately 25 percent of all drug cases, and 5,239 crack cocaine cases, which represent approximately 21 percent of all drug trafficking cases.

Federal crack cocaine offenders have consistently received substantially longer sentences than powder cocaine offenders. The average sentence length for crack cocaine offenders was approximately 129 months, whereas for powder cocaine offenders it was 86 months.

The difference in sentence lengths has increased over time. In 1992 crack cocaine sentences were 25.3 percent longer, while in 2007 they were 50 percent longer than powder cocaine sentences. African Americans continue to represent the substantial majority of crack cocaine offenders. Our data show that in 2007 82.2 percent of Federal crack cocaine offenders were African American, while in 1992 it was 91.4 percent.

Powder cocaine offenders are predominantly Hispanic. According to our 2007 data, Hispanics were 55.9 percent of powder cocaine offenders, compared to 39.8 percent in 1992; 27.5 percent were African American, compared to 27.2 percent in 1992; and White offenders comprised 15.4 percent of powder cocaine offenders, compared to 32.3 percent in 1992.

In its 2007 report, the commission determined the offender's function in the offense by a review of the narrative of the offense conduct section of the pre-sentence report from a 25 percent random sample of crack and powder cocaine cases from fiscal year 2005.

For purposes of our report, offender function was assigned based on the most serious trafficking function performed by the offender in the offense, providing a measure of culpability based on the offender's level of participation in the offense.

According to this analysis, 55.5 percent of crack cocaine offenders were categorized as street-level dealers. The largest portion of powder cocaine offenders—33.1 percent—were categorized as couriers or mules. According to the commission's analysis, only a minority of powder cocaine offenses and crack cocaine offenses involved the most egregious, aggravating conduct, such as weapons involvement, violence or aggravating role in the offense, although it occurs more frequently in crack cocaine offenses than powder cocaine offenses.

Information contained in the 2007 report for fiscal year 2006 indicates that an adjustment under the Federal sentencing guidelines for aggravating role was applied in 6.6 percent of powder cocaine offenses, and an adjustment for aggravating role was applied in 4.3 percent of crack cocaine offenses.

The May 2007 report from fiscal year 2006 data indicates that 8.2 percent of powder cocaine offenders received a guideline weapon enhancement, and 4.9 percent were convicted under Title 18, U.S. Code Section 924(c). By comparison, 15.9 percent of crack cocaine offenders received a guideline weapon enhancement, and 10.9 percent were convicted under 18 U.S.C. Section 924(c).

The commission believes there is no justification for the current statutory penalty scheme for powder and crack cocaine offenses. It is important to note that comment received in writing by the commission and at public hearings have shown that Federal cocaine sentencing policies that provide heightened penalties for crack cocaine offenses continue to come under almost universal criticism from representatives of the judiciary, criminal justice practitioners, academic and community interest groups.

The commission remains committed to its recommendation in 2002 that any statutory ratio be no more than 20:1. Specifically, consistent with its May 2007 report, the commission strongly and unanimously recommends that Congress increase the 5-year and 10-year statutory mandatory minimum threshold quantities for crack cocaine offenses, repeal the mandatory minimum penalty provision for simple possession of crack cocaine, reject addressing the 100:1 drug quantity ratio by decreasing the 5-year and 10-year statutory mandatory minimum threshold quantities for powder cocaine offenses.

The commission further recommends that any legislation implementing these recommendations include emergency amendment authority for the commission to incorporate the statutory changes into the Federal sentencing guidelines.

Sentencing guidelines continue to provide Congress a more finely calibrated mechanism to account for variations in offender culpability and offense seriousness, and the commission remains committed to working with Congress to address the statutorily man-

dated disparity that currently exists in Federal cocaine sentencing policy.

Mr. Chairman, on behalf of all of the bipartisan members who have served through the years on the Sentencing Commission, we urge you to take action, and hopefully soon, on this important issue.

Thank you so much, and I appreciate the extra time that was given to me for my 5 minutes. And we as a bipartisan commission have acted in a bipartisan fashion, and we hope the same happens in Congress.

[The prepared statement of Judge Hinojosa follows:]

PREPARED STATEMENT OF THE HONORABLE RICARDO H. HINOJOSA

Statement of Ricardo H. Hinojosa
Chair, United States Sentencing Commission
Before the House Judiciary Committee
Subcommittee on Crime, Terrorism, and Homeland Security

February 26, 2008

Chairman Scott, Ranking Member Gohmert, and members of the Subcommittee, I appreciate the opportunity to appear before you today to discuss federal cocaine sentencing policy.

As you are aware, the United States Sentencing Commission has been considering cocaine sentencing issues for a number of years and has worked closely with Congress to address the sentencing disparity that exists between the penalties for powder cocaine and crack cocaine offenders. Although the Commission took action this past year to address some of the disparity existing in the federal sentencing guideline penalties for crack cocaine offenses, the Commission is of the opinion that any comprehensive solution to the problem of federal cocaine sentencing policy requires revision of the current statutory penalties and therefore must be legislated by Congress. The Commission encourages Congress to take legislative action on this important issue, and it views today's hearing as an important step in that process.

Part I of this statement briefly summarizes the statutory and guideline penalty structure for crack cocaine offenses. Part II describes some of the findings of the Commission's May 2007 *Report on Cocaine and Federal Sentencing Policy* (the "May 2007 Report"). Part III sets forth the Commission's recommendations for statutory penalty revisions contained in the May 2007 report.

I. Statutory and Guideline Penalty Structure

The Anti-Drug Abuse Act of 1986[1] established the basic framework of statutory mandatory minimum penalties currently applicable to federal drug trafficking offenses. The quantities triggering those mandatory minimum penalties differ for various drugs and, in some cases (including cocaine), for different forms of the same drug.

In establishing the mandatory minimum penalties for cocaine, Congress differentiated between two principal forms of cocaine – cocaine hydrochloride (commonly referred to as "powder cocaine") and cocaine base (commonly referred to as "crack cocaine") – and provided significantly higher punishment for crack cocaine offenses based on the quantity of the drug involved in the offense. As a result of the 1986 Act, federal law requires a five-year mandatory minimum penalty for a first-time trafficking offense involving five grams or more of crack cocaine, or 500 grams or more of powder cocaine, and a ten-year mandatory minimum penalty for a first-time

[1] Pub. L. 99–570, 100 Stat. 3207 (1986), hereinafter "the 1986 Act".

trafficking offense involving 50 grams or more of crack cocaine, or 5,000 grams or more of powder cocaine. Because it takes 100 times more powder cocaine than crack cocaine to trigger the same mandatory minimum penalty, this penalty structure is commonly referred to as the "100-to-1 drug quantity ratio."

When Congress passed the 1986 Act, the Commission was in the process of developing the initial sentencing guidelines. The Commission responded to the legislation by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. Offenses involving five grams or more of crack cocaine or 500 grams or more of powder cocaine, as well as all other drug offenses carrying a five-year mandatory minimum penalty, were assigned a base offense level of 26, corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I. Similarly, offenses involving 50 grams or more of crack cocaine or 5,000 grams or more of powder cocaine, as well as all other drug offenses carrying a 10-year mandatory minimum penalty, were assigned a base offense level of 32, corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I. Crack cocaine and powder cocaine offenses for quantities above and below the mandatory minimum penalty threshold quantities were set proportionately using the same 100-to-1 drug quantity ratio.

In addition, unlike for any other drug, in 1988 Congress enacted statutory mandatory minimum penalties for simple possession of crack cocaine. In fiscal year 2007, there were 109 federal cases for simple possession of crack cocaine, in which 20 offenders were subject to a statutory mandatory minimum penalty of five years or more. In fiscal year 2006, there were 132 such cases, in which 24 offenders were subject to a statutory mandatory minimum punishment.

II. The Commission's May 2007 Report

The Commission has given much consideration to the issue of federal cocaine sentencing policy, releasing its first report to Congress on federal cocaine sentencing policy in 1995 in response to a directive from Congress to study the issue. In that report, the Commission concluded that the Congress's objectives with regard to punishing crack cocaine trafficking could be achieved more effectively "without relying on the current federal sentencing scheme for crack cocaine offenses that includes the 100-to-1 quantity ratio."[2] In 1997, again at the request of Congress, the Commission submitted a report that recommended to Congress that it "revise the federal statutory penalty scheme for both crack and powder cocaine offenses."[3] In 2002, the Commission issued another comprehensive report on federal cocaine sentencing policy that set forth recommendations to Congress on this issue.[4]

In the 2006-2007 guideline amendment cycle, the Commission again undertook an extensive review of the issues associated with federal cocaine sentencing policy. The

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[2] *See* U.S. Sentencing Commission Report to Congress February 1995 at xiv.
[3] *See* U.S. Sentencing Commission Report to Congress April 1997 at 9.
[4] *See* US Sentencing Commission Report to Congress May 2002 at ix.

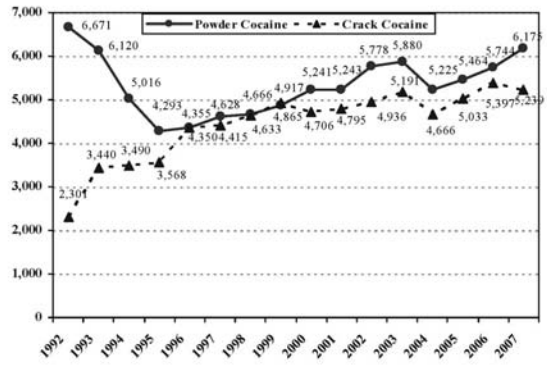
Commission examined sentencing data from fiscal years 2005 and 2006 (including comparing findings derived from that data with findings from the Commission's previous reports to Congress on federal cocaine sentencing policy), surveyed state cocaine sentencing policy, conducted two public hearings, received considerable written public comment, and reviewed relevant scientific and medical literature. Comment received in writing and at the public hearings showed that federal cocaine sentencing policy, insofar as it provides substantially heightened penalties for crack cocaine offenses, continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups.

The Commission's efforts culminated in the issuance of its fourth report to Congress on the subject in May 2007. Some of the key findings of the May 2007 report are summarized below. Where possible, the Commission has updated the tables and figures from its May 2007 report to include information through fiscal year 2007.

A. Federal Cocaine Offenders and Average Sentence Length

Powder cocaine and crack cocaine offenses together historically have accounted for nearly half of the federally-sentenced drug trafficking offenders. In fiscal year 2006, for example, of 25,007 total drug trafficking cases, there were 5,744 powder cocaine cases (23% of all drug trafficking cases) and 5,397 crack cocaine cases (22% of all drug trafficking cases). According to the Commission's preliminary fiscal year 2007 data, of 24,750 total drug trafficking cases, there were 6,175 powder cocaine cases (25% of all drug trafficking cases) and 5,239 crack cocaine cases (21% of all drug trafficking cases).

Updated Figure 2-1
Trend in Number of Powder Cocaine and Crack Cocaine Offenders
FY1992-Preliminary FY2007



Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. This figure excludes cases with missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 2007 Datafiles, MONFY92 – USSCFY06 and Pre20_OPAFY07.

Federal crack cocaine offenders consistently have received substantially longer sentences than powder cocaine offenders, and the difference in sentence length between these two groups of offenders has widened since 2002. Data presented in the May 2007 report, compiled from the Commission's fiscal year 2006 datafile, indicated that the average sentence length for crack cocaine offenders was approximately 122 months, whereas the average sentence length for powder cocaine offenders was approximately 85 months.[5] The differences in sentences between powder cocaine offenses and crack cocaine offenses have increased over time. In 1992, crack cocaine sentences were 25.3 percent longer than those for powder cocaine. As indicated in Updated Figure 2-3, in 2006, the difference was 43.5 percent.

Preliminary data, as set forth in updated Figure 2-2, indicate that, for fiscal year 2007, the average sentence length for crack cocaine offenders was approximately 129 months, whereas the average sentence length for powder cocaine offenders was approximately 86 months. This increase in the average sentence length for crack cocaine offenders may be attributable to three factors. First, as indicated in section B below, the median drug quantity for crack cocaine offenses increased in fiscal year 2007 to 53.5 grams as compared to 51.0 grams in fiscal year 2006.

[5] *See* Updated Fig. 2-2.

Second, most cocaine offenders in the federal system are convicted of statutes carrying a five-year or ten-year mandatory minimum penalty. According to preliminary fiscal year 2007 data, 78.9 percent of powder cocaine offenders were convicted of statutes carrying mandatory minimum terms of imprisonment, compared to 78.5 percent in fiscal year 2006. According to preliminary fiscal year 2007 data, 83.0 percent of crack cocaine offenders were convicted of statutes carrying mandatory minimum terms of imprisonment, compared to 79.1 percent of such offenders in fiscal year 2006.[6] Exposure to mandatory minimum sentences contributes to longer average sentence length and crack cocaine offenders are less likely to receive the benefit of statutory or guideline mechanisms designed for low-level offenders to be sentenced without regard to the statutory mandatory minimums. According to preliminary fiscal year 2007 data, 13.5 percent of crack cocaine offenders received benefit of a safety valve provision, either as set forth at 18 U.S.C. § 3553(f)[7] or through the federal sentencing guidelines, as compared to 14.0 percent in fiscal year 2006.[8] By comparison, preliminary fiscal year 2007 data indicate that 44.6 percent of powder cocaine offenders qualified for the safety valve compared to 45.5 percent in fiscal year 2006.

Third, while offense severity (based on drug type and quantity) is the preliminary determinant of the sentencing guideline range, an offender's criminal history also plays a significant role. The Commission's preliminary data for fiscal year 2007 also suggests that the average number of criminal history events counted under the guidelines may have increased for crack cocaine offenders compared to the average number of such events counted for crack cocaine offenders in fiscal year 2006, even though in both fiscal years, the average criminal history category for these offenders was Criminal History Category III.[9] In comparison, the average criminal history category for powder cocaine offenders was Criminal History Category II in fiscal years 2006 and 2007. These factors taken together may account for the increase in average sentence length for crack cocaine offenses in fiscal year 2007.

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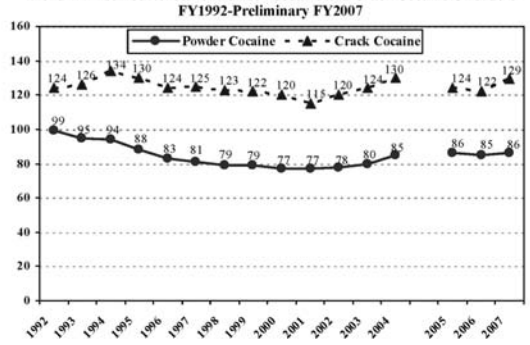
[6] *See* May 2007 Report at 28.

[7] The "safety valve" provides a mechanism by which only drug offenders who meet certain statutory criteria may be sentenced without regard to the otherwise applicable drug mandatory minimum provisions. Enacted in 1994, the safety valve provision was created by Congress to permit offenders "who are the least culpable participants in drug trafficking offenses, to receive strictly regulated reductions in prison sentences for mitigating
factors" recognized in the federal sentencing guidelines.

[8] The Commission uses "safety valve" to refer to cases that received either the 2-level reduction pursuant to USSG §2D1.1(b)(7) and USSG §5C1.2, or relief from the statutory mandatory minimum sentence pursuant to 18 U.S.C. § 3553(f), or both.

[9] A defendant's criminal history category is determined pursuant to USSG §4A1.1.

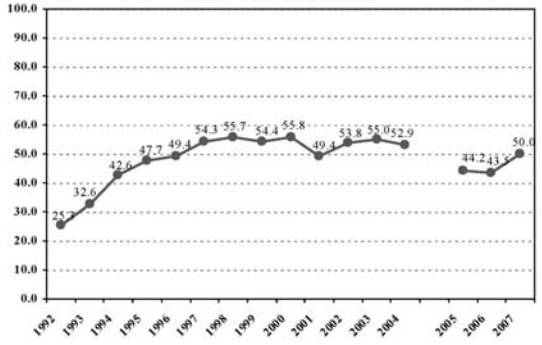
Updated Figure 2-2
Trend in Prison Sentences for Powder Cocaine and Crack Cocaine Offenders
FY1992-Preliminary FY2007



Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. Cases with sentences of probation, or any sentence of intermittent confinement, community confinement, or home detention, are not included in this figure. Cases with sentences greater than 470 months were included in the sentence average computation as 470 months. This figure excludes cases with missing information for the variables required for analysis. This figure also excludes cases sentenced on or after the Supreme Court's June 24, 2004 decision in *Blakely v. Washington*, 542 U.S. 296 (2004) and before its January 12, 2005 decision in *United States v. Booker*, 543 U.S. 220 (2005), as the Commission determined it could not rely on the assumption that the federal sentencing guidelines had been uniformly applied during that period. *See* U.S. Sentencing Commission Final Report on the Impact of *United States v. Booker* on Federal Sentencing at 53 (March 2006).

SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 2007 Datafiles, MONFY92 – USSCFY06 and Pre20_OPAFY07, 2004 Pre-*Blakely* Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005 – September 30, 2005).

Updated Figure 2-3
Trend in Proportional Differences Between Average Cocaine Sentences
FY1992-Preliminary FY2007



Only cases sentenced under USSG §2D1.1 (Drug Trafficking) with a primary drug type of powder cocaine or crack cocaine are included in this figure. Cases with sentences of probation, or any sentence of intermittent confinement, community confinement, or home detention, are not included in this figure. Cases with sentences greater than 470 months were included in the sentence average computation as 470 months. This figure excludes cases with missing information for the variables required for analysis. This figure also excludes cases sentenced on or after the Supreme Court's June 24, 2004 decision in *Blakely v. Washington*, 542 U.S. 296 (2004) and before its January 12, 2005 decision in *United States v. Booker*, 543 U.S. 220 (2005), as the Commission determined it could not rely on the assumption that the federal sentencing guidelines had been uniformly applied during that period. *See* U.S. Sentencing Commission Final Report on the Impact of *United States v. Booker* on Federal Sentencing at 53 (March 2006). The figure shows, for each year, the percentage difference between prison sentences for crack cocaine and powder cocaine. For example, in Fiscal Year 1992, crack cocaine sentences were 25.3 percent greater than powder cocaine sentences. The percentage was calculated by dividing the difference between the average crack cocaine sentence and the average powder cocaine sentence by the average powder cocaine sentence.

SOURCE: U.S. Sentencing Commission, 1992-2006 and Preliminary 2007 Datafiles, MONFY92 – USSCFY06 and Pre20_OPAFY07, 2004 Pre-*Blakely* Only Cases (October 1, 2003 – June 24, 2004), and 2005 Post-*Booker* Only Cases (January 12, 2005 – September 30, 2005).

B. Demographics

African-Americans still comprise the majority of crack cocaine offenders, but that is decreasing, from 91.4 percent in 1992 to 82.2 percent, according to preliminary fiscal year 2007 data. White offenders comprise 8.3 percent of crack cocaine offenders, compared to 3.2 percent in 1992.[10]

Powder cocaine offenders are now predominantly Hispanic. Hispanics accounted for 55.9 percent of powder cocaine offenders, according to preliminary fiscal year 2007 data. African-Americans accounted for 27.5 percent of powder cocaine offenders, and white offenders comprised 15.4 percent of these cases.

[10] *See* Table 2-1, USSC 2007 Cocaine Report.

Updated Table 2-1
Demographic Characteristics of Federal Cocaine Offenders
Fiscal years 1992, 2000 & 2007

	Powder Cocaine						Crack Cocaine					
	1992		2000		2007		1992		2000		2007	
	N	%	N	%	N	%	N	%	N	%	N	%
Race/Ethnicity												
White	2,113	32.3	932	17.8	952	15.4	74	3.2	269	5.6	435	8.3
Black	1,778	27.2	1,596	30.5	1,693	27.5	2,096	91.4	4,069	84.7	4,356	82.2
Hispanic	2,601	39.8	2,662	50.8	3,444	55.9	121	5.3	434	9	414	7.9
Other	44	0.7	49	0.9	78	1.3	3	0.1	33	0.7	29	0.6
Total	6,536	100	5,239	100	6,167	100	2,294	100	4,805	100	5,234	100
Citizenship												
U.S. Citizen	4,499	67.7	3,327	63.9	3,870	62.8	2,092	91.3	4,482	93.4	5,051	96.5
Non-Citizen	2,147	32.3	1,881	36.1	2,291	37.2	199	8.7	318	6.6	185	3.5
Total	6,646	100	5,208	100	6,161	100	2,291	100	4,800	100	5,236	100
Gender												
Female	787	11.8	722	13.8	584	9.5	270	11.7	476	9.9	442	8.4
Male	5,886	88.2	4,518	86.2	5,590	90.5	2,032	88.3	4,330	90.1	4,797	91.6
Total	6,673	100	5,240	100	6,174	100	2,302	100	4,806	100	5,239	100
Average Age	Average=34		Average=34		Average=34		Average=28		Average=29		Average=31	

This table excludes cases missing information for the variable required for analysis.

SOURCE: U.S. Sentencing Commission, 1992, 2002, and Preliminary 2007 Datafiles, MONFY92, USSCFY00 and Pre20_OPYFY07.

C. Offender Function

In its May 2007 report, the Commission determined the offender's function in the offense by a review of the narrative of the offense conduct section of the Presentence Report[11] independent of any application of sentencing guideline enhancements, reductions, or drug quantity.[12] Offender function was assigned based on the most serious trafficking function performed by the offender in the offense and, therefore, provides a measure of culpability based on the offender's level of participation in the offense, independent of the offender's quantity-based offense level in the Drug Quantity Table in the drug trafficking guideline.[13]

To provide a more complete profile of federal cocaine offenders, particularly their function in the offense, the Commission undertook a special coding and analysis

[11] The Presentence Report is one of the five documents courts are required to submit to the Commission pursuant to 28 U.S.C. § 994(w). The other documents are: (1) the charging document; (2) the judgment and commitment order; (3) the plea agreement (if there is one); and (4) the Statement of Reasons form. It is from these five documents that the Commission extracts the data necessary to analyze and report on national sentencing trends and practices.

[12] *See* May 2007 Report at 17. Enhancements for aggravating conduct, such as possession of a dangerous weapon, distribution in protected places or to protected persons, aggravating role, and criminal history, including career offender status, are available within the sentencing guidelines for application in drug trafficking offenses.

[13] *See* May 2007 Report at 17 and A-3. Table A-1 of the Appendix to the May 2007 Report defines 21 categories of offender functions in drug trafficking offenses.

project using a sample of fiscal year 2005 federal offenders.[14] Each offender was assigned a separate function category[15] based on his or her most serious conduct described in the Presentence Report. The function category with the largest portion of powder cocaine offenders was couriers/mules (33.1 percent), which was consistent with the Commission's findings in 2002.[16] The largest portion of crack cocaine offenders fell within the street-level dealer category (55.4 percent).[17] This portion of crack offenders whose most serious conduct was as a street-level dealer is lower than reported in 2002 (66.5 percent).[18]

The sources of the two drug types likely account for these differences in offender functions. Powder cocaine is produced outside the United States and must be imported. In contrast, with rare exception, crack cocaine is produced and distributed domestically. This is demonstrated by Commission data, which suggest that 42.0 of powder cocaine offenses are international in scope whereas 56.6 percent of crack cocaine offenses may be classified at the neighborhood level.[19]

The Commission's data analysis also is consistent with the presence of a pyramid structure in drug trafficking, with the largest number of federal cocaine offenders performing lower-level functions.[20]

D. Drug Quantity and Dosages

Drug type and quantity are the two primary factors that determine offense levels under the federal sentencing guidelines, combining to establish the base offense level for drug trafficking offenses. According to the Commission's analysis, in fiscal year 2006, the median drug weight for powder cocaine offenses was 6,000 grams. The median drug weight for crack cocaine offenses was 51 grams.[21] According to preliminary fiscal year 2007 data, the median drug weights increased to 6,240 grams for powder cocaine offenses and 53.5 grams for crack cocaine offenses.

With respect to doses, one gram of powder cocaine generally yields five to ten doses, whereas one gram of crack cocaine yields two to ten doses. Thus, 500 grams of powder cocaine – the quantity necessary to trigger the five-year statutory mandatory

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[14] The findings on offender function contained in this section are derived from the fiscal year 2005 drug sample. The fiscal year 2005 drug sample consists of a 25 percent random sample of powder cocaine (1,398 of the 5,744 cases) and crack cocaine (1,172 of the 5,397 cases) offenders sentenced under the primary drug trafficking guideline (USSG §2D1.1) in fiscal year 2005 after the January 12, 2005 Supreme Court decision in *United States v. Booker*, 543 U.S. 220 (2005). *See* May 2007 Report at A-2.

[15] For a complete discussion of the categories to which an offender was assigned, *see* May 2007 Report at 18.

[16] A "courier/mule" transports drugs with the assistance of a vehicle or other equipment, or internally, or on his or her person. May 2007 Report at 18.

[17] A "street-level dealer" distributes retail quantities (less than one ounce) directly to users. May 2007 Report at 18.

[18] *See* May 2007 Report at Fig. 2-6.

[19] *See* May 2007 Report at Fig. 2-7. For a detailed description of geographic scope, *see* Table A-2 of the May 2007 Report. "Neighborhood" indicates that the largest scope of the offense conduct occurs at or around a street corner of the few blocks within that immediate area. By contrast, "international" indicates that the largest scope of the offense conduct crosses the United States border.

[20] *See* May 2007 Report at 85.

[21] *See* May 2007 Report at Table 2-2.

minimum penalty – yields between 2,500 and 5,000 doses. In contrast, five grams of crack cocaine – the quantity necessary to trigger the five-year statutory mandatory minimum penalty – yields between ten and 50 doses.[22]

E. Offender Conduct

According to the Commission's analysis, only a minority of powder cocaine offenses and crack cocaine offenses involve the most egregious aggravating conduct. As categorized by the Commission, aggravating conduct includes weapon involvement, violence, and aggravating role in the offense.

Weapon involvement is the most common aggravating conduct in both crack cocaine and powder cocaine offenses. According to the Commission's fiscal year 2005 data sample, weapon involvement, broadly defined,[23] occurred in 27.0 percent of powder cocaine offenses and 42.7 percent of crack cocaine offenses.[24] Under a narrower definition of weapon enhancement (i.e., one that relies exclusively on offender conduct and excludes weapon involvement of others), 15.7 percent of powder cocaine offenders had access to, possessed, or used a weapon, compared to 32.4 percent of crack cocaine offenders in the Commission's fiscal year 2005 drug sample.[25] Further limiting the analysis to cases in which a guideline or statutory weapon enhancement applied, in fiscal year 2006, 8.2 percent of powder cocaine offenders received a weapon enhancement under the guidelines, and 4.9 percent were convicted pursuant to 18 U.S.C. § 924(c). By comparison, 15.9 percent of crack cocaine offenders received the guideline weapon enhancement, and 10.9 percent were convicted pursuant to 18 U.S.C. § 924(c).[26]

According to the Commission's analysis, the prevalence of violence, as indicated by the occurrence of any injury, death, and threats of injury or death,[27] has decreased for both powder and crack cocaine since the Commission's review of cocaine sentencing in 2002. It continues to occur in only a minority of offenses. According to the Commission's fiscal year 2005 data sample, 93.8 percent of powder cocaine offenses did not have violence associated with them, as compared to 89.6 percent of crack cocaine offenses. Death was associated with 1.6 percent of powder cocaine cases and 2.2 percent of crack cocaine offenses. Any injury occurred in 1.5 percent of powder cocaine offenses and 3.3 percent of crack cocaine offenses. The threat of violence occurred in 3.2 percent of the powder cocaine offenses and 4.9 percent of the crack cocaine offenses.[28]

An adjustment for a defendant's aggravating role in the offense pursuant to the federal sentencing guidelines, including whether the defendant was an organizer, leader,

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[22] *See* May 2007 Report at 63.
[23] *See* May 2007 Report at 31. For purposes of this analysis, "weapon involvement" was defined as weapon involvement by *any* participant, ranging from weapon use by the offender to access to a weapon by an un-identified co-participant. *Id.*
[24] See May 2007 Report at Figure 2-15.
[25] *See* May 2007 Report at 33; figure 2-16.
[26] See May 2007 Report at Table 2-2. For a more detailed analysis of application of weapons enhancements, *see* May 2007 Report at pages 31-36.
[27] *See* May 2007 Report at 38; Figure 2-20.
[28] *See* May 2007 Report at Fig. 2-20.

manager, or supervisor of the criminal activity,[29] was given in 6.6 percent of powder cocaine cases and 4.3 percent of crack cocaine cases, according to the Commission's analysis of fiscal year 2006 data. According to preliminary fiscal year 2007 data, the aggravating role adjustment was given in 7.7 percent of powder cocaine offenses and 4.6 percent of crack cocaine offenses.

III. Recommendations

The Commission believes that there is no justification for the current statutory penalty scheme for powder and crack cocaine offenses. The Commission remains committed, however, to its recommendation in 2002 that any statutory ratio be no more than 20-to-1. Specifically, consistent with its May 2007 Report, the Commission strongly and unanimously recommends that Congress:

- Increase the five-year and ten-year statutory mandatory minimum threshold quantities for crack cocaine offenses to focus the penalties more closely on serious and major traffickers as described generally in the legislative history of the 1986 Act.

- Repeal the mandatory minimum penalty provision for simple possession of crack cocaine under 21 U.S.C. § 844.

- Reject addressing the 100-to-1 drug quantity ratio by decreasing the five-year and ten-year statutory mandatory minimum threshold quantities for powder cocaine offenses, as there is no evidence to justify such an increase in quantity-based penalties for powder cocaine offenses.

The Commission further recommended in its May 2007 report that any legislation implementing these recommendations include emergency amendment authority[30] for the Commission to incorporate the statutory changes in the federal sentencing guidelines. Emergency amendment authority would enable the Commission to minimize the lag between any statutory and guideline modifications for cocaine offenders.

The Commission believes that sentencing guidelines continue to provide Congress a more finely calibrated mechanism to account for variations in offender culpability and offense seriousness than was available at the time the 100-to-1 drug quantity ratio was established in 1986, and the Commission recommends to Congress that any concerns it has about harms associated with cocaine drug trafficking are best captured through the sentencing guideline system.

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[29] *See* USSG §3B1.1 (Aggravating Role) (2007). To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants.

[30] "Emergency amendment authority" allows the Commission to promulgate amendments outside of the normal amendment cycle described in footnote 3, *supra*.

IV. Conclusion

The Commission is strongly and unanimously committed to working with Congress to address the statutorily mandated disparities that currently exist in federal cocaine sentencing. The Commission also is committed to working with Congress on all other issues related to maintaining just and effective national sentencing policy in a manner that preserves the bipartisan principles of the Sentencing Reform Act.

Thank you for the opportunity to testify before you today and I look forward to answering your questions.

Mr. SCOTT. Thank you very much. We will see what we can do. I thank you and the work of the Sentencing Commission. Thank you very much.

Ms. Shappert?

TESTIMONY OF GRETCHEN SHAPPERT, U.S. ATTORNEY FOR THE WESTERN DISTRICT OF NORTH CAROLINA, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Ms. SHAPPERT. Thank you, Mr. Chairman. Thank you for inviting the Department of Justice to appear before you today and discuss cocaine sentencing policy.

My name is Gretchen Shappert, and I am the United States attorney for the western district of North Carolina. I have been in public service most of my adult life, first as an assistant public defender and as a prosecutor. And I earlier this month completed 4.5 weeks of trail in my own district, two of those cases involving crack cocaine. Indeed, much of my career in public service has been defined by the ravages of crack cocaine.

Mr. Chairman, I spent last Friday afternoon in the assembly room of an African American church in south Statesville, North Carolina. Now, I know that most of the Committee probably has never heard of Statesville, but it means the world to me. It is an important community in the western district of North Carolina, and it has absolutely been ravaged by crack cocaine.

I was there last Friday to meet with members of that community to discuss their efforts for drug treatment in that community, and when I walked into the room and sat down, one of the ministers slid across the table the article from Friday's Washington post, discussing the fact that a huge number of individuals are eligible for release early on their Federal sentences by virtue of crack cocaine retroactivity.

His question to me, Mr. Chairman, was, "And what are you going to do to help us?" And to be honest with you, I did not have a very good answer.

The Department of Justice recognizes that the penalty structure and quantity differentials for powder and crack cocaine created by Congress as part of the Anti-Drug Abuse Act of 1986 are seen by many as empirically unsupportable and unfair because of their disproportionate impact.

As this Subcommittee knows, since the mid-1990's there has been a great deal of discussion and debate on the issue. There have been many proposals, but little consensus as to how this should be dealt with. We in the Department of Justice remain committed to that effort today and are here in a spirit of cooperation to continue working toward a viable solution. We continue to insist upon working together to get it right, not just for offenders, but also for the law-abiding people and victims we serve.

When considering reforms to cocaine sentencing, we must never forget that honest, law-abiding citizens are directly impacted by what drug dealers do. Unlike the men and women who choose to sell drugs, those who live in these neighborhoods are terrorized by those who sell the drugs and must look to the criminal justice system to protect them.

Toward that end, any reform to cocaine sentencing must satisfy two conditions. First, any reforms should come from the Congress, not the United States Sentencing Commission; and second, any reforms, except in very limited circumstances, should apply only prospectively, not retroactively.

Bringing the expertise of the Congress to this issue will give the American people the best opportunity for a well considered and fair result that takes into account not just the differential between crack and powder offenders, but the implications of crack and powder cocaine trafficking on the communities and the citizens we serve.

In considering these options, we continue to believe that a variety of factors fully justify higher penalties for crack offenses. It has been said, and certainly it has been my experience, that whereas powder cocaine destroys an individual, crack cocaine destroys a community.

I was in Charlotte as an assistant public defender when the crack epidemic hit in the late 1980's, and it entirely changed the landscape of law enforcement. We saw an epidemic of violence, open-air drug markets, urban terrorism unlike anything we had experienced in the past. Sounds of gunfire in certain neighborhoods were not uncommon at night. Families were afraid to leave their homes after dark. And a number of individuals, Mr. Chairman, slept in their bathtubs to avoid stray gunfire.

In some states for the communities to which I referred to earlier, our crack dealers are now deliberately giving away crack cocaine to juveniles in an effort to get them hooked on crack cocaine to create a workforce of individuals distributing crack cocaine, who are unlikely to be prosecuted in Federal court.

Quite simply, crack cocaine and powder cocaine are different. They are different with their impact on communities. With crack cocaine we see open air drug markets. We see violence. We see gun-related crimes, intimidation, fear, aggravated criminal histories and recidivism, as well as higher and more serious rates of addiction.

According to the United States Sentencing Commission report, powder cocaine offenders had access to, possession of or used weapons in 15.7 percent of the cases in 2005. The number of crack offenders was double, who possessed firearms.

I would note in the findings of the commission that were referenced in the Washington Post article that appeared on Friday—information, incidentally, that the Department of Justice learned about from the Washington Post and did not have earlier—the point was made that only a small percentage of these offenders are associated with violence.

But it is very important to see how violence is defined. That is defined violence only to include actual violence or the impending fear of violence. The Department of Justice submits that the heightened criminal records, that the heightened use and possession of weapons by these offenders is a better indication of prospective violence as we move forward.

The second key point of any discussion of changes in the cocaine and crack penalties is that cocaine should be prospective, and not retroactive. I see that my time has run out, but I would simply

point out that the impact of retroactivity is going to be profound on our communities.

In my district, the western district of North Carolina, approximately 536 offenders will be eligible to possibly have their sentences cut. That represents 66 percent of the caseload for 1 year in my district. And the process of adjudication of these cases will be very difficult for prosecutors simply because witnesses are no longer available, prosecutors have moved on, agents have retired, evidence has been destroyed. The prospect of having to effectively present this information to the court is severely limited by the passage of time.

I will be happy to answer questions. Thank you.

[The prepared statement of Ms. Shappert follows:]

PREPARED STATEMENT OF GRETCHEN C.F. SHAPPERT

Department of Justice

STATEMENT OF

GRETCHEN C. F. SHAPPERT
UNITED STATES ATTORNEY
WESTERN DISTRICT OF NORTH CAROLINA
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

CONCERNING

"HEARING ON CRACKED JUSTICE – ADDRESSING THE UNFAIRNESS IN COCAINE SENTENCING"

PRESENTED

February 26, 2008

Mr. Chairman, members of the Subcommittee –

Thank you for inviting the Department of Justice to appear before you today to discuss federal cocaine sentencing policy. My name is Gretchen Shappert, and I am the United States Attorney for the Western District of North Carolina. I have been in public service most of my professional life, both as a prosecutor and as an assistant public defender. Earlier this month, I completed 4 ½ consecutive weeks of trial, including two trials in my district involving crack cocaine distribution. Indeed, much of my professional career has been defined by the ravages of crack cocaine, both as a defense attorney and as a prosecutor.

The Department of Justice recognizes that the penalty structure and quantity differentials for powder and crack cocaine created by Congress as part of the Anti-Drug Abuse Act of 1986 are seen by many as empirically unsupportable and unfair because of their disparate impact. As this subcommittee knows, since the mid-1990s, there has been a great deal of discussion and debate on this issue. There have been many proposals but little consensus on exactly how these statutes should be changed.

We remain committed to that effort today and are here in a spirit of cooperation to continue working toward a viable solution. We continue to insist upon working together on this issue that we get it right not just for offenders, but also for the law-abiding people whom we are sworn to serve and protect.

It has been said, and certainly it has been my experience, that whereas cocaine powder destroys an individual, crack cocaine destroys a community. The emergence of crack cocaine as the major drug of choice in Charlotte during the late 1980's dramatically transformed the landscape. We saw an epidemic of violence, open-air drug markets, and urban terrorism unlike anything we had experienced previously. The sound of gunfire after dark was not uncommon in some communities. Families were afraid to leave their homes after dark and frightened individuals literally slept in their bathtubs to avoid stray bullets.

I have also seen the dramatic results when federal prosecutors, allied with local law enforcement and community leaders, make a commitment to take back neighborhoods from the gun-toting drug dealers who have laid claim to their communities. The successes of our Project Safe Neighborhoods (PSN) initiatives, combined with Weed & Seed, have literally transformed neighborhoods. In Shelby, North Carolina, for example, federal prosecutions of violent crack-dealing street gangs have slashed the crime rate and have enabled neighborhood groups to begin a community garden, truancy initiatives, and sports programs for young people. Traditional barriers are breaking down, and Shelby is thriving as an open and diverse small southern city. This transformation would not have been possible without an aggressive and collaborative approach to the systemic crack cocaine problem in that community.

In the jury trial I completed February 6th, the jury convicted the remaining two defendants in a seventy-person drug investigation that originated in the furniture manufacturing community of Lenoir, North Carolina. Several years ago, street drug dealers literally halted

traffic to solicit crack cocaine customers in several Lenoir communities. At trial, the jury heard of an episode where drug dealers kidnapped and held for ransom one of their coconspirators, demanding repayment of a drug debt. After pistol-whipping their hostage, they finally released him. This is the kind of violent activity we have come to expect from crack cocaine traffickers, even in relatively tranquil small communities.

I am pleased to be able to tell you that we used the tools that Congress gave us to stop these dealers. We built strong cases against them. Local law enforcement officers, in conjunction with federal agents, have seized substantial quantities of crack and firearms from these dealers and dismantled their operations. It is a testament to the courage of people who live in these communities that they have been willing to cooperate with law enforcement and testify. Our most powerful witnesses are the citizens who have been victimized by crack-related violence. Cooperation from citizens in these communities is based upon their trust in our ability to prosecute these violent offenders successfully and send them away for lengthy federal prison sentences.

I know from my conversations with state and federal prosecutors from around the country that our experience in North Carolina is not unique or uncommon. When considering reforms to cocaine sentencing, we must never forget that honest, law-abiding citizens are also affected by what these dealers do. Unlike the men and women who chose to commit the crimes that terrorized our neighborhoods, the only choice many of the residents of these neighborhoods have is to rely on the criminal justice system to look out for them and their families. Let us make sure

the rules we make at the federal level allow us to continue to do so.

Toward that end, we believe that any reform to cocaine sentencing must satisfy two important conditions. First, any reforms should come from the Congress and not the United States Sentencing Commission. Second, any reforms, except in very limited circumstances, should apply only prospectively. I will discuss the reasons necessitating each condition in turn.

First, bringing the expertise of the Congress to this issue will give the American people the best chance for a well-considered and fair result that takes into account not just the differential between crack and powder on offenders, but the implications of crack and powder cocaine trafficking on the communities and citizens whom we serve. Congress struck the present balance in 1986. Since then, although there have been many policy objections raised in debate, these statutes have been repeatedly upheld as constitutional. As a federal prosecutor, I have done my best to enforce these laws for the benefit of our communities.

Cleared of hyperbole, what we are talking about is whether the current balance between the competing interests in drug sentencing is appropriate. We are trying to ascertain what change will ensure that prosecutors have the tools to effectively combat drug dealers like those who terrorized western North Carolina while addressing the concerns about the present structure's disparate impact on African-American offenders. That is a decision for which Congress and this Subcommittee are made. At some level, the United States Sentencing Commission itself recognized that when it delayed retroactive implementation of the reduced

crack cocaine guideline until March 3, 2008, thereby giving Congress a short window to review and consider the broader implications of their policy choice.

In considering options, we continue to believe that a variety of factors fully justify higher penalties for crack offenses. In the cases I have prosecuted, I have seen the greater violence at the local level associated with the distribution of crack as compared to powder. United States Sentencing Commission data and reports confirm what I have seen, as they show that in federally prosecuted cases, crack offenders are more frequently associated with weapons use than powder cocaine offenders. According to the United States Sentencing Commission 2007 report on Crack Cocaine, powder cocaine offenders had access to, possession of, or used a weapon in 15.7 percent of cases in 2005. In contrast, crack cocaine offenders had access to, possession of, or used a weapon in 32.4 percent of cases in 2005.

That said, we understand that questions have been raised about the quantity differential between crack and powder cocaine, particularly because African-Americans constitute the vast majority of federal crack offenders. The Department of Justice is open to discussing possible reforms of the differential that are developed with victims and public safety as the foremost concerns, and that would both ensure no retreat from the success we have had fighting drug trafficking and simultaneously increase trust and confidence in the criminal justice system.

Second, reforms in this area, except in very limited circumstances, should apply prospectively. Notwithstanding the wide differences in the bills addressing the crack-powder

differential, there is one great commonality. Across the board, they are all drafted to apply only prospectively.

Without finality, the criminal law is deprived of much of its deterrent effect. Even where the Supreme Court has found constitutional infirmities affecting fundamental rights of criminal defendants, it rarely has applied those rules retroactively. For example, the United States Supreme Court has not made its constitutional decision in *United States v. Booker*, the most fundamental change in sentencing law in decades, retroactive.

The shortcomings of retroactive application of new rules are illustrated starkly in the Sentencing Commission's recent decision to extend eligibility for its reduced crack penalty structure retroactively to more than 20,000 crack dealers already in prison.

Proponents of retroactivity argue that we should not be worried about the most serious and violent offenders being released too early because a federal judge will still have to decide whether to let such offenders out. But that misses an important point. The litigation and effort to make such decisions in so many cases forces prosecutors, probation officers, and judges to marshal their limited resources to keep in prison defendants whose judgments were already made final under the rules as all the parties understood them and reasonably relied on them to be.

The swell of litigation triggered by the Commission's decision will affect different districts differently. Where it will have the most impact, however, will be in those districts that

have successfully prosecuted the bulk of crack cases over the past two decades. Fifteen districts will bear a disproportionate 42.8 percent of the estimated eligible offenders. Similarly, more than 50 percent of the cases will have to be handled by the Fourth, Fifth, and Eleventh Circuits. The 536 estimated offenders in my district who are eligible for resentencing is the equivalent of 66 percent of all criminal cases handled in my district in 2006.

The litigation, furthermore, is likely to be greater than that envisioned by the Commission. Notwithstanding strict guidance to the contrary, the federal defenders already have issued guidance telling defense counsel to argue that the Supreme Court's decision in *United States v. Booker* applies and that, therefore, every court should consider not only the two-level reductions authorized by the Commission but conduct a full resentencing at which any and all mitigating evidence may be considered. If courts accept this argument, the administrative and litigation burden will far exceed the estimates the Commission relied upon in making their new rule retroactive and will create the anomalous result that only crack defendants – many of whom are among the most violent of all federal defendants - will get the benefit of the retroactive effect of *Booker*.

With retroactivity, many of these offenders, probably at least 1600 at a minimum, will be eligible for immediate release. Others will have their sentences cut in such a fashion that they may not have the full benefit of the Bureau of Prison's pre-release programs to prepare them to come back to their communities. I am deeply concerned that the success we are experiencing in some of our most fragile, formerly crack-ravaged communities will be seriously interrupted if

these communities are forced to absorb a disproportionate number of convicted felons, who are statistically among the most likely persons to re-offend.

Because Congress only has until March 3, 2008 to have a say in that decision, Attorney General Mukasey asked Congress to quickly enact legislation to prevent the retroactive application of the United States Sentencing Commission amendments. Specifically, he asked Congress to ensure that serious and violent offenders remain incarcerated for the full terms of their sentences. In calling for action, he emphasized that "we are not asking this Committee to prolong the sentences of those offenders who pose the least threat to their communities, such a first-time, non-violent offenders. Instead, [he said,] our objective is to address the Sentencing Commission's decision in a way that protects public safety and addresses the adverse judicial and administrative consequences that will result."

The Federal Sentencing Guidelines assign to each offender one of six criminal history categories. The categorization is based upon the extent of an offender's past misconduct and the recency of the crimes. Criminal History Category I is assigned to the least serious criminal record and includes many first-time offenders. Criminal History Category VI is the most serious category and includes offenders with the lengthiest criminal records. The Sentencing Commission's data shows that nearly 80 percent of the offenders who will be eligible for early release have a criminal history category of II or higher. Many of them will also have received an enhanced sentence because of a weapon or received a higher sentence because of their aggravating role in the offense.

Almost none of these offenders were new to the criminal justice system. The data shows that 65.2 percent of potentially eligible offenders had a criminal history category of III or higher. That fact alone tells us that these offenders will pose a much higher risk of recidivism upon their release.

The Sentencing Commission's 2004 recidivism study shows that offenders with a criminal history category of III have a 34.2 percent chance of recidivating within the first two years of their release. Those with criminal history category of VI have a 55.2 percent chance of recidivating within the first two years of their release.

Our concern about the early release of these offenders is amplified by the fact that retroactive application of the crack amendment would result in many prisoners being unable to participate in specific pre-release programs provided by the Bureau of Prisons (BOP). Preparation to reenter society intensifies as the inmate gets closer to release. As part of this process, BOP provides a specific release preparation program and works with inmates to prepare a variety of documents that are needed upon release, such as a resume, training certificates, education transcripts, a driver's license, and a social security card. BOP also helps the inmate identify a job and a place to live. Finally, many inmates receive specific pre-release services afforded through placement in residential re-entry centers at the end of their sentences.

With no adjustments to BOP's prisoner re-entry processes, any reductions in sentence such as those contemplated by the retroactive application of the guideline may reduce or eliminate inmates' participation in the Bureau's re-entry programs. Without that, the offender's chance of re-offending will likely increase.

Mr. Chairman, the Department of Justice is open to addressing the differential between crack and powder penalties as part of an effort to resolve the retroactivity issue. It is our hope that as we work together we can make sure that there is no retreat in the fight against drug trafficking and no loss in the public's trust and confidence in our criminal justice system.

I would ask that the written portion of my statement be made a part of the record. I would be happy to answer any questions you may have. Thank you.

Mr. SCOTT. Thank you.
Mr. Cassilly?

TESTIMONY OF JOSEPH I. CASSILLY, STATE'S ATTORNEY FOR HARFORD COUNTY AND PRESIDENT-ELECT OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, BEL AIR, MD

Mr. CASSILLY. Thank you, Mr. Chairman and Members of the Committee.

I am testifying on behalf of the National District Attorneys Association, representing state and local prosecutors. We have adopted a resolution regarding the sentencing disparity between crack and powder cocaine. It recognizes that adjustment is warranted, but just as the current disparity cannot be justified, the proposed 1:1 realignment also lacks empirical or clinical evidence.

There is not, in reality, a 100:1 difference in the sentences given to crack versus powder offenders. A DOJ report finds that for equal amounts of crack and powder cocaine, that penalties range from 6.3 times greater to approximately equal to powder sentences.

The cooperation of Federal and state prosecutors and law enforcement that has developed over the years is due in large part to the interplay of Federal and state laws. Maryland laws, for example, differentiate sentences between crack and powder cocaine offenders on a 9:1 ratio for a major dealer.

Local prosecutors bring large quantity dealers for Federal prosecution primarily because of the discretion of Federal prosecutors in dealing with these cases. The result is that the majority of these cases are resolved by a guilty plea to a sentence below the statutory amount.

The effect of guilty pleas is that serious violent criminals are immediately removed from our communities. Civilian witnesses do not appear for trial or sentencing hearings and are not as subject to threats and intimidation, which would happen if we were forced to proceed with these cases in court.

Many criminals who could be affected by retroactive application of a new sentencing scheme have already received the benefits of lower sentences and would get a second, unjust reduction at new sentencing hearings. It is critical that Federal sentences remain stricter than state laws, if this coordinated interaction is to continue.

There is a difference between crack versus powder cocaine on the user. A study entitled "Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?" states, "The effects of cocaine are similar, regardless of whether it is in the form of cocaine hydrochloride or crack cocaine. However, evidence exists showing a greater abuse liability, greater propensity for dependence, and more severe consequences when cocaine is smoked, compared with intranasal use. The crucial variables appear to be the immediacy, duration and magnitude of cocaine's effects, as well as the frequency and amount of cocaine used, rather than the form of cocaine."

The Drug Enforcement Administration predicts that a crack user is likely to consume between 13 to 66 grams per month, for a cost per user between $1,300 and $6,600. A typical powder user consumes about two grams per month, for a cost of about $200.

There is a difference in the associated crimes and the effect on the community caused by crack, as opposed to powder cocaine. The inability to legitimately generate the money needed by a crack addict leads to crimes that can produce ready cash, such as robbery, drug dealing and prostitution. Studies show crack cocaine use is more associated with this systemic violence than powder cocaine use.

One study found that the most prevalent form of violence related to crack cocaine was aggravated assault. Another study identified crack as the drug most closely linked to trends in homicide cases. And a third study showed that weapons were involved in crack convictions more than twice as often as powder convictions.

In one study 86.7 percent of women surveyed were not involved in prostitution in the year before starting crack use. Women who were prostitutes dramatically increased their involvement after starting the use of crack, with rates nearly four times higher.

One complaint about the sentencing disparity is that it discriminates against Black crack dealers versus white powder dealers. Unfortunately, what most discriminates is the violence, degradation and community collapse that is associated with crack use and crack dealers.

A stop snitching video in Baltimore was made by Black dealers to threaten Black citizens with retaliation and death for standing up to the dealers. A family of five was killed by a firebomb, which was thrown into their home at the direction of crack dealers, because the mother reported crack dealing on the street in front of their home.

If there is a need to reduce the disparity between crack and powder cocaine, then perhaps the solution is to increase sentences for powder cocaine. We ask the Congress to make any decisions with regard to scientific and empirical study evidence and not simply on the desire to move from one extreme to the other.

Thank you.

[The prepared statement of Mr. Cassilly follows:]

PREPARED STATEMENT OF JOSEPH I. CASSILLY

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State's Attorney Harford County, Bel Air, Maryland
and
President-Elect, National District Attorneys Association

"Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity"

Subcommittee on Crime, Terrorism & Homeland Security
House Committee on Judiciary
United States House of Representatives

February 26, 2008

I am testifying on behalf of the National District Attorneys Association, the oldest and largest organization representing State and local prosecutors. Attached is a resolution adopted by NDAA regarding the sentencing disparity between crack and powder cocaine. NDAA agrees that some adjustment is warranted, but just as the 100:1 disparity cannot be justified by empirical data we believe that the proposed 1:1 realignment of Federal penalties for crack versus powder cocaine also lacks any empirical or clinical evidence. A random adjustment will have severe negative consequences on the efforts of this nation's prosecutors to remove the destructive effects of crack and violence from our communities.

The cooperation of Federal and State prosecutors and law enforcement that has developed over the years is due in large part to the interplay of Federal and State laws. I have been a criminal prosecutor for over 30 years. My prosecutors and I work on one of the most active and successful task forces in Maryland. We actively operate with federal agents and prosecutors from the U. S. Attorney for Maryland.

Maryland state statutes differentiate sentences between crack and powder cocaine offenders on a 9:1 ratio based on the amount that would indicate a major dealer. There is not a 100:1 difference in the sentences given to crack versus powder offenders. A DOJ report states, "A facial comparison of the guideline ranges for equal amounts of crack and powder cocaine reveals that crack penalties range from 6.3 times greater to approximately equal to powder sentences."

In recent years local prosecutors have brought hundreds of large quantity dealers for Federal prosecution, primarily because of the discretion of Federal prosecutors in dealing with these cases. This discretion allows for pleas to lesser amounts of cocaine or the option of not seeking sentence enhancements. The end result is that the majority of these cases are ultimately resolved by a guilty plea to a sentence below the statutory amount.

The practical effect of guilty pleas is that serious violent criminals are immediately removed from our communities, they spend less time free on bail or in pre-trial detention, civilian witnesses are not needed for trial or sentencing hearings and are therefore not subject to threats and intimidation and undercover officers are not called as witnesses: all of which would happen if we were forced to proceed with these cases in courts. Yet meaningful sentences are imposed, which punish the offender but also protect the community and allow it to heal from harm caused by these offenders. Moreover the plea agreements often call for testimony against higher ups in the crack organization. It is critical that Federal sentences for serious crack dealers remain stricter than State laws if this coordinated interaction is to continue.

First let me dispel some of the myths about controlled substance prosecutions that are propagated by those who would de-criminalize the devastation caused by illegal drugs.

Myth 1. Prisons are full of first time offenders caught with small quantities of C.D.S.

The fact is that in joint Federal or State investigations small quantity dealers are delegated to State prosecutors for prosecution. First time users are almost never sent to jail but are directed into treatment programs; a jail sentence is suspended to provide an incentive for them to participate in treatment.

Myth 2. There is no difference between the affect of crack versus powder cocaine on the user [1]

In a study entitled "Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?" by D. K. Hatsukami and M.W. Fischman, Department of Psychiatry, Division of Neurosciences, University of Minnesota, Minneapolis it is stated,

> "The physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of cocaine hydrochloride or crack cocaine (cocaine base). However, evidence exists showing a greater abuse liability, greater propensity for dependence, and more severe consequences when cocaine is smoked (cocaine-base) ... compared with intranasal use (cocaine hydrochloride). The crucial variables appear to be the immediacy, duration, and magnitude of cocaine's effect, as well as the frequency and amount of cocaine used rather than the form of the cocaine."

Smoked cocaine results in the quickest onset and fastest penetration. Generally, smoked cocaine reaches the brain within 20 seconds; the effects last for about 30 minutes, at which time the user to avoid the effects of a "crash" re-uses. The Drug Enforcement Administration's (DEA) intelligence indicates that a crack user is likely to consume

[1] Most of the following comments are taken from reports of the United States Sentencing Commission or of the Department of Justice.

anywhere from 3.3 to 16.5 grams of crack a week, or between 13.2 grams and 66 grams per month.

Intranasally administered cocaine has a slower onset. The maximum psychotropic effects are felt within 20 minutes and the maximum physiological effects within 40 minutes. The effects from intranasally administered cocaine usually last for about 60 minutes after the peak effects are attained. A typical user snorts between two and three lines at a time and consumes about 2 grams per month.

Using these amounts, the cost per user per month for crack cocaine is between $1,300 and $6,600 as compared to a cost for powder cocaine of $200 per month; a 6.5 to 33:1 ratio in cost.

Myth 3. There is no difference in the associated crimes and the effect on the community caused by crack as opposed to powder cocaine.

The inability to legitimately generate the large amount of money needed by a crack addict leads to a high involvement in crimes that can produce ready cash such as robbery and prostitution. Studies show crack cocaine use is more associated with systemic violence than powder cocaine use. One study found that the most prevalent form of violence related to crack cocaine abuse was aggravated assault. In addition, a 1998 study identified crack as the drug most closely linked to trends in homicide rates. Furthermore, crack is much more associated with weapons use than is powder cocaine: in FY 2000, weapons were involved in 10.6% of powder convictions, and 21.3% of crack convictions.

One of the best-documented links between increased crime and cocaine abuse is the link between crack use and prostitution. According to the authors of one study, "hypersexuality apparently accompanies crack use." In this study, 86.7% of women surveyed were not involved in prostitution in the year before starting crack use; one-third become involved in prostitution in the year after they began use. Women who were already involved in prostitution dramatically increased their involvement after starting to use crack, with rates nearly four times higher than before beginning crack use.

One complaint about the sentencing disparity is that it discriminates against blacks crack dealers versus white powder dealers. Unfortunately, what most discriminates against our black citizens is the violence, degradation and community collapse that is associated with crack use and crack dealers and their organizations. It is the black homeowners who most earnestly plead with me, as a prosecutor, for strict enforcement and long prison sentences for crack offenders. The stop snitching video was made by black crack dealers in Baltimore to threaten black citizens with retaliation and death for fighting the dealers. A black family of five was killed by a fire bomb which was thrown into their home at the direction of crack dealers because they were reporting crack dealers on the street in front of their house.

Many Federal, State and local prosecutors who struggle with the problems of crack can point out those areas in their jurisdictions with the highest violent crime rates are the same areas with the highest crack cocaine use.

Congress should consider that many persons serving federal crack sentences have received consideration from the prosecutors in return for a guilty plea. (i.e. pleas to lesser amounts of cocaine or the option of not seeking sentence enhancements) Many criminals who could be affected by a retroactive application of a new sentencing scheme have already received the benefits of lower sentences and would get a second reduction. New sentencing hearings would mean that citizens from the communities the crack dealers once ruined would have to come forward to keep the sentences from being cut.

The nation's prosecutors urge Congress to adopt a sentencing scheme with regard to the destruction caused by crack cocaine to our communities. If there is a need to reduce the disparity between crack and powder cocaine then perhaps the solution is to increase sentences for powder cocaine.

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RESOLUTION CONCERNING THE DISPARITY IN FEDERAL PENALTIES FOR COCAINE BASE (CRACK) AND POWDER COCAINE

WHEREAS Federal law provides for a 100:1 ratio in the amounts of powder cocaine and cocaine base (crack) that trigger mandatory minimum sentences; and

WHEREAS there currently exists a disparity between federal sentences for cocaine base (crack) and powder cocaine; and

WHEREAS the United States Sentencing Commission has recently lowered the sentencing tiers for cocaine base (crack) in order to reduce the disparity between penalties for cocaine base (crack) and powder cocaine; and

WHEREAS the United States Sentencing Commission has given consideration to the retroactive application of the sentencing guidelines changes; and

WHEREAS there currently exist several varying pieces of legislation in the 110th Congress that attempt to address the disparity; and

WHEREAS the National District Attorneys Association (NDAA) recognizes that significant differences exist in the manner in which cocaine base (crack) and powder cocaine are ingested, the onset of euphoria, the duration of the effects, the rate of addiction; and the likelihood of non-drug, revenue producing criminal activity; and

THEREFORE BE IT RESOLVED, that the National District Attorneys Association (NDAA) believes that there exist evidence-based reasons to recognize the differences between cocaine base (crack) and powder cocaine, however, the NDAA acknowledges that the current level of sentencing disparity that exists between cocaine base (crack) and powder cocaine is not justified nor evidence-based; and

BE IT FURTHER RESOLVED, that the National District Attorneys Association believes that the issue of sentencing disparity can and should be revisited by the United States Congress; and

Mr. SCOTT. Thank you.
Mr. Short?

TESTIMONY OF MICHAEL SHORT, FORMER OFFENDER, MARYLAND

Mr. SHORT. Thank you for having me. I want to thank Chairman Scot and Ranking Member Gohmert and Members of the Subcommittee for giving me this opportunity to testify today.

My name is Michael Short, and I am here because in 1992 I was convicted of selling 63 grams of crack cocaine, and on November 13th of 1992, I was sentenced to 235 months in prison. And I served 15 years and 8 months of that sentence.

In prison I worked very hard. I earned my associates degree in business management by way of Pell grants, and when a Pell grant was no longer available, I continued to educate myself by the resources from my family and my friends, and I obtained a nutritionist specialist degree, core conditioning exercise certification, certified personal trainers license, biometric training, and I also completed computer courses and brick masonry. Right now I am currently employed as a certified personal trainer.

And in 2001 I asked the President of the United States to grant me executive clemency. I asked him to recognize that I was sorry for my actions that I had done, and all I could do to improve my life, and that more time in prison would serve no further purpose. I am deeply gratified to tell you that President Bush granted my petition on December 12, 2007.

To be clear, I know that what I did was wrong. I sold illegal drugs, and I deserved to be punished. But what I did and who I was did not justify the sentence I received. And while today I am telling my story, it is also the story of many men that I know in prison, non-violent offenders serving 10, 20 or 30 years for crack cocaine offenses.

I did not need 20 years to convince me of the error in my ways, to punish men or to set me on a right path. My sentence was altogether too long. It was too long because of the way the law treats crack cocaine. Twenty years is the kind of sentence that drug kingpins should get—big-time drug dealers. But I was not a drug kingpin. I was sentenced like one, because the drug I was convicted for was crack cocaine.

The law treats one gram of crack cocaine the same as 100 grams of powder cocaine. If I had been sentenced for the same amount of powder cocaine, I would have left prison roughly 7 years ago, after serving 9 years, which is still a very long time in prison.

I have heard some of the comments some people in positions of power have made about crack cocaine prisoners—that we are violent gang members and that this is why our sentences have to be so much longer. I am not that person, and most of the people that I leave behind in prison aren't either.

I grew up in a warm, close, supportive family. I had all I needed, and though I made a terrible mistake, there was no violence in my crime. I was not a gang member. I was sentenced for such a long time because of a stereotype.

People like me convicted of crack cocaine offenses are serving longer prison sentences than we would serve, were we sentenced

for powder cocaine. They keep hearing how wrong this is and cannot understand why, if so many people, including the Supreme Court, the Sentencing Commission and even some presidential candidates feel this way, does nothing change?

They made us all feel that the system itself is stacked against us and that no one cared enough to right a wrong. My sentence was too long, and yet no one in the criminal justice system seemed to be able to do anything to shorten it. I also see a racial disparity there reflected. It is reflected in the system.

While I believe that it was not intended to punish people who look like me more harshly, I can tell you that in prison there is a sense of terrible unfairness and imbalance in who goes away for the longest sentences. It makes a person distrustful. There was a lot of talk amongst prisoners about how our system is anything but colorblind.

I think that your job is to be sure that punishment is adequate, but not excessive. As someone who has spent so much time in prison, I can tell you we are aware of every hour, every day and every month. It is tough. Certainly, it hurts us. There is a point beyond which this lesson could be learned and punishments that could be extracted are well past their loss. And beyond that point, it makes no sense to warehouse those humans.

But even worse, I think that what it does to people who love us on the outside. Not a day passed that my mother did not worry about me getting harmed in prison. And she felt the injustice of this sentence very much. She was in prison just as surely as I was. I lost my mother during those years; in all I lost ten family members while I was away.

I will never replace those people, and they will never know me as I have become. But I will tell you that I want to do all that I can to convince you to save other families from what mine had to endure. As you consider correcting this injustice of crack cocaine sentencing, I want you to know that if you do, it will be a tremendous gesture unto all the people who are serving unduly long sentences.

That said, I can see no reason to do anything other than make crack sentences the same as those for powder cocaine, and best for all, get rid of mandatory minimum sentences once and for all. It is a terrible system that ignores the individuals and sentences based only on the weight of some drugs.

Mandatory minimums forbid a judge from taking the whole person into account. Remorse, acceptance of responsibility, the influence of coercion or poverty, addiction—all of it gets swept aside in favor of one measure, the weight of drugs. It makes the small fry as liable to serve extremely hard sentences as those who actually deserve them.

I received the gift of freedom when President Bush commuted my sentence. I cannot begin to tell you what it meant. You have that same power. You have a tough job of fixing this disparity. It is just the right thing to do. If you correct this one injustice, you will help correct a terrible injustice and at the same time restore some of the lost faith in the criminal justice system.

Thank you.

[The prepared statement of Mr. Short follows:]

PREPARED STATEMENT OF MICHAEL SHORT

I want to thank Chairman Scott, Ranking Member Gohmert and members of the Subcommittee for giving me this opportunity to testify. My name is Michael Short. I am here because in 1992 I was sentenced for selling crack cocaine. Before then I had never spent a day in prison. I came from a good home and a good family. I had no criminal history. I was not a violent offender. But, on November 13, 1992, I was sentenced to serve nearly twenty years in federal prison. I was 21 years old.

In prison I worked hard and achieved a lot. I earned my Associates degree in Business Management from Park College in 1995. I also earned my Nutrition Specialist degree, Core Conditioning Exercise certification, and am certified in CPR-AED. I became a certified personal trainer, completing the coursework through the National Federation of Professional Trainers, and last week I started my new job at a health club in Prince Georges County. I did everything I could to improve myself and use my time well.

In 2001 I asked the President of the United States to grant me executive clemency. I asked him to recognize that I was sorry for my actions, that I had done all I could to improve my life and that more time in prison would serve no further purpose. I am deeply gratified to tell you that President Bush granted my petition on December 12, 2007.

To be clear, I know what I did was wrong. I sold illegal drugs and I deserved to be punished. But what I did and who I was did not justify the sentence I received. And while today I am telling my story, it is also the story of the many men that I know in prison—nonviolent offenders serving ten years, twenty years or longer for crack cocaine offenses.

I did not need twenty years to convince me of the error of my ways, to punish me or to set me on the right path. My sentence was altogether too long. It was too long because of the way the law treats crack cocaine.

Twenty years is the kind of sentence that drug kingpins should get—big time dealers. But I was no drug kingpin. I was sentenced like one because the drug I was convicted for was crack cocaine. The law treats one gram of crack cocaine the same as 100 grams of powder cocaine. If I had been sentenced for the same amount of powder cocaine, I would have left prison roughly seven years ago after serving nine years, which is still a very long time in prison.

I have heard some of the comments some people in positions of power have made about crack cocaine prisoners—that we are violent gang members and that is why our sentences have to be so much longer. I am not that person and most of the people I leave behind in prison aren't either. I grew up in a warm, close, supportive family. I had all I needed and, though I made a terrible mistake, there was no violence in my crime. I was not a gang member. I was sentenced for such a long time because of a stereotype.

People like me, convicted of crack cocaine offenses, are serving years longer in prison than they would serve were they sentenced for powder cocaine. They keep hearing how wrong this is and cannot understand why, if so many people including the Supreme Court, the Sentencing Commission and even some presidential candidates feel this way, does nothing change. It made us all feel that the system itself was stacked against us or that no one cared enough to right a wrong. My sentence was too long and yet no one in the criminal justice system seemed to be able to do anything to shorten it.

I also see the racial disparity that is reflected in this system. While I believe that it was not intended to punish people who look like me more harshly, I can tell you that in prison there is a sense of a terrible unfairness and imbalance in who goes away for the longest sentences. It makes a person distrustful. There was a lot of talk among prisoners about how our system is anything but colorblind.

I think your job is to be sure that punishment is adequate but not excessive. As someone who has spent so much time in prison, I can tell you we are aware of every hour, every day and every month. It is tough. Certainly it hurts us; there is a point beyond which the lessons that could be learned and the punishment that could be extracted are well past—they are lost. And beyond that point it makes no sense to warehouse those humans.

But even worse, I think, is what it does to the people who love us on the outside. Not a day passed that my mother did not worry about me getting harmed in prison. And she felt the injustice of this sentence very much. She was in prison just as surely as I was. I lost my mother during those years; in all I lost ten family members while I was away. I will never replace those people and they will never know me as I have become. But I will tell you that I want to do all I can to convince you to save other families from what mine had to endure.

As you consider correcting the injustice of crack cocaine sentencing, I want you to know that if you do, it will be a tremendous gesture to all the people who are serving unduly long sentences. That said, I can see no reason to do anything other than make crack sentences the same as those for powder cocaine and best of all, get rid of mandatory minimum sentencing once and for all. It is a terrible system that ignores the individual and sentences based only on the weight of some drugs. Mandatory minimums forbid a judge from taking the whole person into account. Remorse, acceptance of responsibility, the influence of coercion or poverty, addiction, all of it gets swept aside in favor of one measure: the weight of drugs. It makes the small fry as liable to serve extremely harsh sentences as those who actually deserve them.

I received the gift of freedom when President Bush commuted my sentence. I cannot begin to tell you what that meant. You have that same power. You have a tough job, but fixing this disparity is just the right thing to do. If you correct this one injustice you will help correct a terrible injustice and at the same time restore some of the lost faith in the criminal justice system.

Thank you.

Mr. SCOTT. Thank you very much, Mr. Short.

Mr. Nachmanoff?

TESTIMONY OF MICHAEL NACHMANOFF, FEDERAL PUBLIC DEFENDER FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA, VA

Mr. NACHMANOFF. Mr. Chairman and Members of the Subcommittee, thank you for holding this hearing and providing me with the opportunity to speak on behalf of Federal and community defenders from around the country regarding the reform of the Federal cocaine sentencing laws.

As Federal public defenders, we have represented thousands of individuals just like Mr. Short, who have been charged with crack cocaine offenses in the Federal courts. And we have seen firsthand the gross injustice caused by the dramatic, unjustified disparity in the punishment between crack cocaine and powder cocaine.

We have seen the devastating impact that imposing draconian punishments in crack cases has had on our clients, their families and their communities. When low-level crack dealers are punished more harshly than wholesale suppliers of powder cocaine, a necessary ingredient to make crack, it undermines people's confidence in the criminal justice system.

When the punishments imposed in crack cases are routinely harsher than the punishments received by traffickers of heroine and PCP, it further erodes confidence in the system and undermines respect for it. And when those individuals who face unduly excessive sentences are overwhelmingly African American and the majority of those who distribute powder cocaine are predominantly not African American, it creates an intolerable situation that cries out for reform.

The crack-powder disparity is wrong, and it must be fixed. The Sentencing Commission's recent amendments to the crack cocaine guideline and its decision to make them retroactive represent a small, but significant step in addressing that problem.

The Supreme Court's recent recognition that judges must be permitted to take into consideration this unwarranted disparity in determining fair and appropriate sentences is another positive step, but it is the fundamental structure of Federal cocaine sentencing that is the underlying problem, and only Congress can solve it comprehensively.

In an effort to address these problems, Federal and community defenders support the following reforms. The crack-powder disparity should be eliminated by equalizing the penalties for crack and powder.

The mandatory minimum for simple possession should be repealed. Not only is it grossly unfair and unique among drug laws to single out the mere possession of crack for a 5-year mandatory sentence, but it prevents individualized sentencing, as all mandatory minimums do, which we believe is essential to any just sentencing system. In this regard we also support providing judges with alternatives to incarceration for drug offenses, including the option of imposing probation.

And finally, we urge the funding of pilot programs for Federal substance abuse courts, which would provide a needed alternative to the costly and wasteful incarceration of individuals, who often have no opportunity for meaningful drug treatment in the prison system.

Now, the structure of Federal sentencing for cocaine is grossly unfair, and I think it is important for the Committee to consider some facts that have not come out at this hearing and relate directly to some of the things that have been offered by the witnesses who have already testified.

With respect to the kinds of cases that are brought at the Federal level, the witness for the National District Attorneys Association has suggested that the state and Federal authorities cooperate well and ensure that referrals are made of large traffickers so that the Federal Government can address those cases, which, of course, was the original congressional intent when the Anti-Drug Abuse Act of 1986 was passed.

That is not the case. In the Eastern District of Virginia and throughout the country, what we see day in and day out is small-time, low-level drug dealers, who are brought into Federal court and prosecuted and are subject to the draconian penalties that the Federal sentencing laws authorize.

In the State of Maryland, there were 46 crack prosecutions in 2006. The median weight for those cases was 90 grams of crack cocaine. According to statistics, the median weight for a high-level trafficker is 2,962 grams—almost three kilos of crack cocaine. An average of 90 grams is 5 percent of what a high-level trafficker deals in. If the U.S. attorney's office in Maryland is bringing only high-level cases, then they are certainly a different kind of case than what the statistics show a high-level case should be.

A street-level dealer deals in 50 grams. That is the median weight for a street-level dealer. Over 35 percent of cases nationwide in 2006 involved less than 25 grams of crack cocaine—less than half the amount of the median weight for a street-level dealer. And, of course, those amounts are far in excess of the five-gram trigger for a 5-year mandatory sentence.

When Congress passed these laws in 1986, they just got it completely wrong. If the idea was to target mid-level traffickers and high-level traffickers at a 5-year mandatory minimum and 10-year mandatory minimum, they got the quantities wrong. You could not have a lower amount of crack cocaine being distributed.

Recently in the Eastern District of Virginia, we represented an individual who was prosecuted in Federal court for distribution of .11 grams of crack cocaine—.11 grams. If it had been any less, there wouldn't have been any crack cocaine there at all. And this case was taken from the state, and it was federalized. And that individual received a punishment of 120 months for that .11 grams of crack cocaine.

With regard to the retroactivity, the witness for the Department of Justice has suggested that this is going to be an enormous burden on the court system. That is simply not the case. For the past 2 months, Federal defenders, probation officers, judges have been working around the country to find efficient and fair ways of addressing retroactivity, and they have been remarkably successful.

In our district, which is the largest district in the country in terms of the eligible cases, we have a grand total of 16 individuals that we filed motions on behalf of and who we hope, if the judges sign the orders, will be released on March 3rd—16 individuals.

While I can appreciate the Department of Justice is concerned with the re-entry of these individuals into their communities, it is extremely important for the Committee to understand that these are individuals who would be coming back to their communities anyway. These are people who are very often at the very end of their sentence.

In the Eastern District of Virginia, these 16 individuals that we represent had often 2, 3, 6 months left to serve. Many of them were in halfway houses. So these people were on their way back to their communities.

Eight of the 16 had no criminal history or criminal history category of one or two. These are not dangerous people. These are not violent people. These are not gang members.

The Department of Justice also emphasized the fact that they somehow believe the statistics don't accurately reflect the danger of this population. The fact of the matter is that 94.5 percent of all crack cocaine offenses do not involve violence. They involve no deaths. They involve no bodily injury. In almost 90 percent of the cases, not only is there no actual violence—there is not even the threat of violence. Ninety percent of these cases are not violent offenses.

The Department of Justice has suggested that because there is a certain percentage of weapons involvement, that that translates to violence and danger. Well, the fact of the matter is a weapons enhancement can be based on the possession of a gun by a co-conspirator in his closet. In other words, there is no reason to believe that these individuals, who may have even gotten a gun bump, an additional time on their sentence, would be dangerous or would be violent or even possess the gun in the first place themselves.

I see that I am out of time, and I thank the Committee.

[The prepared statement of Mr. Nachmanoff follows:]

PREPARED STATEMENT OF MICHAEL NACHMANOFF

Statement of Michael S. Nachmanoff
Federal Defender for the Eastern District of Virginia
On Behalf of the Federal Public and Community Defenders
Before the Judiciary Committee of the House of Representatives
Subcommittee on Crime, Terrorism and Homeland Security

February 26, 2008 Hearing
Hearing on Cracked Justice – Addressing the Unfairness in Cocaine Sentencing

Mr. Chairman and Members of the Subcommittee:

Thank you for holding this hearing and for the opportunity to speak to you on behalf of the Federal Public and Community Defenders regarding the urgent need for reform of the federal cocaine sentencing laws. The Defenders have offices in 90 of 94 federal judicial districts. We represent thousands of people charged with federal crack cocaine offenses, 82% of whom are African American.[1] In the Eastern District of Virginia, where I am the Federal Defender, there were 253 crack cocaine prosecutions in 2006, the highest number in the nation. Of those, 37.5% involved less than 25 grams.[2]

As well-documented by the Commission in its four reports to Congress beginning in 1995, the severity of crack cocaine penalties based on drug type is unjustified and unfair, has a disproportionate impact on African Americans, and creates the widely held perception that the penalty structure promotes unwarranted disparity based on race.[3]

The Sentencing Commission has taken a first step to "somewhat alleviate" these "urgent and compelling problems."[4] With the overwhelming support of the Judiciary, U.S. Probation, the Federal Defenders, the private defense bar, and community groups, the Commission promulgated a two-level reduction, which became law on November 1, 2007 with congressional approval. On December 11, 2007, after receiving over 33,000 letters from the public in support of making the amendment retroactive, the Commission voted unanimously to do so, as with prior amendments benefiting offenders of other races and more serious offenders.

The amended guideline range now includes, but no longer exceeds, the mandatory minimum penalty at the two statutory quantity levels for an offender in Criminal History Category I, and guideline ranges above, between and below the two statutory quantity

[1] USSC, Cocaine and Federal Sentencing Policy 16 (May 2007).

[2] *Id.* at 112-14, Table 5-3.

[3] USSC, Cocaine and Federal Sentencing Policy (February 1995); USSC, Cocaine and Federal Sentencing Policy (April 1997); USSC, Cocaine and Federal Sentencing Policy (May 2002); USSC, Cocaine and Federal Sentencing Policy (May 2007).

[4] USSC, Cocaine and Federal Sentencing Policy 9 (May 2007).

levels continue to be keyed to the mandatory minimum penalties.[5] Before the amendment, guideline sentences for crack were three to over six times longer than for powder cocaine;[6] now they are two to five times longer.[7] In the Commission's view, the amendment is "only a partial remedy to some of the problems associated with the 100-to-1 drug quantity ratio," and requires a "comprehensive solution" from Congress, at which time the guidelines can be further amended.[8]

On December 10, 2007, the Supreme Court recognized that the sentencing guidelines for crack undermine the purposes of sentencing and create unwarranted disparity, even as amended, based on the Sentencing Commission's findings. Thus, a sentencing court does not abuse its discretion when it imposes a below-guideline sentence for those reasons.[9] Again, however, this is only a partial remedy. A judge cannot sentence below a mandatory minimum, and many courts remain hesitant to sentence outside the guidelines.

Thus, until Congress acts, the cocaine penalty structure continues to undermine the purposes of sentencing and to create unjustified disparity.

The Defenders support the following reforms:

1. Penalties for offenses involving the same quantity of crack and powder cocaine should be equalized at a level no greater than the current level for powder cocaine.

2. Differences among offenses and offenders should be taken into account by the sentencing judge in the individual case. Aggravating circumstances should not be built into every sentence for crack cocaine, but should affect the sentence only if they exist in the individual case, as with all other drug types.

3. The mandatory minimum for simple possession of crack cocaine should be repealed.

4. Mandatory minimums for all drug offenses should be repealed.

5. A pilot program for federal substance abuse courts should be established.

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[5] USSC, Cocaine and Federal Sentencing Policy 9-10 (May 2007).

[6] *Id.* at 3.

[7] USSG § 2D1.1 (Nov. 1, 2007).

[8] USSC, Cocaine and Federal Sentencing Policy 9-10 (May 2007).

[9] *Kimbrough v. United States*, 128 S. Ct. 558 (2007).

6. Alternatives to incarceration, including probation, should be made available for all drug offenses.

7. If Congress authorizes the appropriation of funds for additional salaries and expenses for the prosecution of a substantial number of additional drug trafficking cases, it should authorize the appropriation of additional funds for the defense of such cases.

8. Finally, Congress should reject the Department's efforts to reverse the progress made by the Commission and to divert Congress from enacting a comprehensive and long overdue solution to the unfairness in cocaine sentencing.

I. Penalties for Offenses Involving the Same Quantity of Crack and Powder Cocaine Should Be Equalized at a Level No Greater Than the Current Level for Powder Cocaine.

There is no basis for punishing crack cocaine offenders any more severely than powder cocaine offenders based on drug type. They are the same drug and have the same effects. Indeed, all crack cocaine was once powder. Yet, the current penalty structure often punishes low level crack cocaine offenders more severely than high level powder cocaine offenders. Further, the majority of crack cocaine prosecutions are of low level street dealers. This diverts law enforcement and prosecution resources from high level offenders and contributes to the overcrowding of federal prisons with people who do not need to be there. At the same time, it does not prevent or deter drug crime. Instead, it destroys individuals, families and communities, contributes to recidivism, and undermines confidence in the justice system.

A. The Current Cocaine Penalty Structure Often Results in Punishment That is More Severe for Low Level Offenders Than for High Level Offenders, Serving No Legitimate Law Enforcement Goal and Wasting Resources.

A "major goal" of the Anti-Drug Abuse Act of 1986 was "to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources" on "major" and "serious" drug traffickers.[10] In practice, the largest number of prosecutions involving cocaine of any type is against low level offenders, *i.e.*, street level dealers of crack cocaine and couriers of powder cocaine.[11] This misplaced focus is particularly serious in crack cocaine prosecutions, as 55.4% of all crack cocaine offenders are street level dealers, while 33.1% of powder cocaine offenders are couriers.[12]

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[10] H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 1986, 1986 WL 295596 (Background).

[11] USSC, Cocaine and Federal Sentencing Policy 85 (May 2007).

[12] *Id.* at 20-21, Figures 2-5 & 2-6.

The median quantity of crack cocaine associated with the function of a street-level dealer is 52 grams.[13] In 2006, over 35% of all crack cocaine cases involved less than 25 grams,[14] and nearly 50% involved less than 50 grams.[15] This is because "sellers at the retail level are the most exposed and easiest targets for law enforcement, provide an almost unlimited number of cases for prosecution, and are easily replaced."[16]

John P. Walters, Director of the Office of National Drug Control Policy, told Congress in early 2005 that the current policy of focusing on small-time dealers and users was ineffective in reducing crime, while breaking generation after generation of poor minority young men.[17] As the Sentencing Commission has found, "retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating a low level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else."[18]

This focus on low level crack offenders is particularly irrational since "virtually all cocaine is imported in powder form."[19] Powder cocaine is a necessary ingredient of crack cocaine without which crack cocaine cannot be made. Yet, high level powder dealers are punished less severely than low level crack dealers.

A person with no criminal history who possesses 5 grams of crack (10-50 doses), whether for personal use or sale, is subject to a guideline sentence of 51-63 months (after the 2007 amendment) and a mandatory minimum of five years. Five grams of powder converts to about 4 ½ grams of crack cocaine by simply adding baking soda, water and heat. But a person possessing 5 grams of powder (25-50 doses) with intent to distribute receives a guideline sentence of only 10-16 months, or if for personal use, no more than 12 months. To receive a five-year mandatory minimum sentence, a powder cocaine offender must distribute 500 grams, or 2,500-5,000 doses.[20]

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[13] USSC, Cocaine and Federal Sentencing Policy at 45, Figure 10 (May 2002) (median drug weight for street level crack dealers was 52 grams in 2000).

[14] *See* USSC, Cocaine and Federal Sentencing Policy at 112, Table 5.3 (May 2007).

[15] *Id.* at 25, Figure 2.10.

[16] *Id.* at 85.

[17] Kris Axtman, *Signs of Drug-War Shift*, Christian Science Monitor, May 27, 2005.

[18] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004). *See also* USSC, *Cocaine and Federal Sentencing Policy* 68 (Feb. 1995) (DEA and FBI reported that dealers were immediately replaced).

[19] *Id.* at 85.

The five-year sentence for possessing or distributing 5 grams or 10-50 doses of crack (less than the average for a street level dealer, *see* footnote 24) is the same as the guideline sentence for dumping toxic waste knowing that it creates an imminent danger of death, the same as that for theft of $7 million, and double that for aggravated assault resulting in bodily injury.[21] The ten-year sentence for distributing 50 grams or 20-100 doses of crack (still less than the average for a street level dealer, *see* footnote 24), is far greater than any of those, slightly more than that for voluntary manslaughter, the same as that for theft of $50 million, and triple that for racketeering.[22]

Here is a comparison of the profitability of crack cocaine trafficking at the two mandatory minimum levels with that for other offenses punished at the same level:[23]

Level 24: 51-63 months, Criminal History Category I	
Crack: 5 grams @ $150/gram	$750
Powder: 400 grams @ $110/gram	$44,000
Marijuana: 80 kg. @ 2.47/gram	$197,600
Fraud	$2,500,000-$7,000,000
Level 30: 97-121 months, Criminal History Category I	
Crack: 50 grams @ $150/gram	$7500
Powder: 3.5 kg. @ $110/gram	$385,000
Marijuana: 700 kg. @ 2.47/gram	$1,729,000
Fraud	$50,000,000-$100,000,000

Any proposal that would continue to punish crack offenders more harshly than powder cocaine offenders may perpetuate the problems that currently exist. For example, a 20:1 ratio, in which 25 grams would be subject to a five-year sentence and 250 grams would be subject to a ten-year sentence, would not focus law enforcement resources on kingpins or major traffickers. A quantity of 25 grams of crack is half that associated with

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[20] USSC, Cocaine and Federal Sentencing Policy 63 (May 2007).

[21] *See* USSG §§ 2A2.2, 2B1.1 2Q1.1.

[22] *See* USSG §§ 2A1.3, 2B1.1, 2E1.1.

[23] Prices for crack and powder cocaine were taken from Figures 4.4 and 4.5 of the Commission's 2007 Cocaine Report. The price for marijuana was taken from Table 9 of the Office of National Drug Policy Control's Report, *The Price and Purity of Illicit Drugs, 1981 Through the Second Quarter of 2003* (November 2004), available at http://www.whitehousedrugpolicy.gov/publications/price_purity/results.pdf. The fraud amount is taken from USSG § 1B1.1 (Nov. 1, 2007). The quantity levels for the drugs are taken from USSG § 1D1.1 (Nov. 1, 2007).

a mere street-level dealer.[24] A quantity of 250 grams is orders of magnitude less than that associated with a high-level supplier or organizer/leader,[25] is in the neighborhood of that associated with such lowly roles as manager and cook, and is far less than that associated with a mere courier.[26]

As these figures suggest, quantity is a poor and imprecise measure of culpability, and both quantity and type are subject to happenstance and manipulation. A typical street level dealer who supervises no one and makes little profit continues to sell small quantities of crack to an informant until he is arrested. That he is arrested after selling 250 grams of crack to an informant over the course of weeks or months does not make him a major drug trafficker.

Any disparity between crack and powder cocaine based on drug type invites manipulation of type and quantity, resulting in longer sentences for low level offenders and shorter sentences for serious offenders. The Commission has found that drug quantity manipulation and untrustworthy information provided by informants are continuing problems in federal drug cases.[27] These problems are particularly pronounced in cocaine cases because the simple process of cooking powder into crack results in a drastic sentence increase, and because a very small increase in the quantity of crack results in a very large increase in the sentence. The result is that agents and eager-to-please informants insist that powder be cooked into crack, arrange to buy the threshold amount in a single sale, or make additional buys, all for the purpose of arriving at the higher crack sentence.[28] Rather than encouraging law enforcement to focus on existing "major" and "serious" drug traffickers, the unfortunate fact is that the crack/powder disparity lends itself to abuse, creating long sentences for low level offenders who have no information to offer while more culpable offenders receive shorter sentences in return

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[24] USSC, Cocaine and Federal Sentencing Policy at 45, Figure 10 (May 2002) (median drug weight for street level crack dealers was 52 grams in 2000).

[25] *Id.* (median weight for high level supplier of crack was 2962 grams in 2000).

[26] *Id.* (median weight of crack in 2000 for managers was 253 grams, for cooks was 180 grams, and for couriers was 338 grams).

[27] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 50, 82 (2004).

[28] *See, e.g., United States v. Fontes*, 415 F.3d 174 (1st Cir. 2005) (at agent's direction, informant rejected two ounces of powder defendant delivered and insisted on two ounces of crack); *United States v. Williams*, 372 F.Supp.2d 1335 (M.D. Fla. 2005) ("[I]t was the government that decided to arrange a sting purchase of crack cocaine [producing an offense level of 28]. Had the government decided to purchase powder cocaine (consistent with Williams' prior drug sales), the base criminal offense level would have been only 14."); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005) (defendant could have been arrested after the first undercover sale, but agent purchased the same amount on three subsequent occasions, doubling the guideline sentence from 87-108 months to 168-210 months).

for their cooperation. This is the very definition of unwarranted disparity, wastes taxpayer dollars, and should be eliminated from the federal cocaine sentencing laws.

B. All of the Evidence Supports Equal Punishment for Equal Quantities of Crack and Powder Cocaine at a Level No Greater Than the Current Level for Powder Cocaine.

Addiction and other medical effects on the user are the same for crack and powder cocaine and less serious in many respects than those of heroin, nicotine and alcohol. Crack and powder cocaine cause identical physiological and psychotropic effects regardless of the method of ingestion.[29] In any form, cocaine is potentially addictive.[30] While snorting powder cocaine is less addictive than smoking crack or injecting powder, "powder cocaine that is injected is more harmful and more addictive than crack cocaine."[31] The risk and severity of addiction to any drug are significantly affected by the way they are ingested,[32] but no drug other than crack is punished more severely based on the most common method of ingestion.

One reason cocaine is smoked more often than it is injected is that smoking is safer given the risk of infection from sharing needles.[33] The danger to public health associated with needles, including the spread of AIDS and hepatitis, is more severe than the threat to public health posed by smoking crack. "People who inject cocaine can experience severe allergic reactions and, as with all injecting drug users, are at increased risk for contracting HIV and other blood-borne diseases."[34]

By 2004, opioid painkiller deaths outnumbered the total of deaths from heroin or cocaine.[35] Emergency room admissions are highest, and approximately equal, for alcohol and any kind of cocaine.[36]

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[29] USSC, Cocaine and Federal Sentencing Policy at 62-64 (May 2007).

[30] *Id.* at 65.

[31] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 132 (2004).

[32] USSC, Cocaine and Federal Sentencing Policy at 65 (May 2007).

[33] USSC, Cocaine and Federal Sentencing Policy at 66 (May 2007).

[34] National Institute on Drug Abuse, *NIDA InfoFacts: Crack and Cocaine*, available at http://www.nida.nih.gov/Infofacts/cocaine.html.

[35] Testimony of Dr. Leonard J. Paulozzi, Medical Epidemiologist, Centers for Disease Control and Prevention, before Committee on Energy & Commerce, U.S. House of Representatives (Oct. 24, 2007) (emphasis added), available at http://www.cdc.gov/washington/testimony/2007/t20071024.htm.

[36] USSC, Cocaine and Federal Sentencing Policy at 77-78 (May 2007).

The highest rate of treatment admissions is for alcohol abuse, followed by marijuana, heroin, crack cocaine, methamphetamine, and powder cocaine.[37] Cocaine addiction appears to be more treatable than heroin or alcohol addiction. *See, e.g.,* Drug and Alcohol Services Information Report, *Admissions with 5 or More Prior Episodes: 2005* (of people seeking treatment in 2005 who had 5 or more prior treatment episodes, 37% were addicted to opiates, 36% to alcohol, and only 16% to cocaine). According to one study, it is more difficult to quit using nicotine or heroin than to quit using cocaine, withdrawal symptoms are more severe for alcohol and heroin than for cocaine, and the level of intoxication is greater for alcohol and heroin than for cocaine.[38]

Negative effects of prenatal exposure are mild and identical for crack and powder cocaine and less severe than for other substances including alcohol. The negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure, which are significantly less severe than previously believed, are similar to prenatal tobacco exposure, less severe than heroin or methamphetamine exposure, and far less severe than prenatal alcohol exposure. The 2005 National Survey of Drug Use and Health estimated that of infants exposed to illicit drugs in utero, 7% were exposed to powder cocaine, 2% were exposed to crack cocaine, 73% were exposed to marijuana, and 34% were exposed to unauthorized prescription drugs.[39] A recent study found no differences in growth, IQ, language or behavior between three-year-olds who were exposed to cocaine in the womb and those who were not. *See* Kilbride, Castor, Cheri, *School-Age Outcome of Children With Prenatal Cocaine Exposure Following Early Case Management*, Journal of Developmental & Behavioral Pediatrics, 27(3):181-187, June 2006.

The incidence of violence is low, steadily decreased after the 1980s, and is addressed, if it occurred, through available enhancements in individual cases. In crack cases in 2005, death occurred in only 2.2% of cases, any injury occurred in only 3.3% of cases, and a threat was made in 4.9% of cases.[40] Thus, 94.5% of cases involved no actual violence, and 89.6% involved no violence or threat of violence. Only 2.9% of crack offenders in 2005 used a weapon.[41]

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[37] *Id.* at 79.

[38] Phillip J. Hilts, *Relative Addictiveness of Drugs*, New York Times, Aug. 2, 1994 (study by Dr. Jack E. Henningfield of the National Institute on Drug Abuse and Dr. Neal L. Benowitz of the University of California at San Francisco ranked six substances based on five problem areas), http://www.tfy.drugsense.org/tfy/addictvn.htm.

[39] USSC, Cocaine and Federal Sentencing Policy at 68-71 (May 2007).

[40] *Id.* at 38.

[41] *Id.* at 33.

There has been a reduction in violence associated with crack since 1992. According to the Commission, this is consistent with the aging of the crack cocaine user and trafficker populations.[42] "By the early 1990s . . . the relationship between crack and unwelcome social outcomes had largely disappeared. . . . After property rights were established and crack prices fell sharply reducing the profitability of the business, competition-related violence among drug dealers declined."[43]

Violence or weapon involvement, if it occurred, should be taken into account through enhancements in individual cases. Building it into the punishment for any given quantity of crack cocaine on the assumption that it occurs in every case punishes offenders for conduct that did not occur or double counts it when it did occur.

Recidivism is relatively low and is addressed if it exists through the criminal history score and other enhancements in the individual case. For Criminal History Categories II and higher, drug offenders have the *lowest* rate of recidivism of all offenders[44] Further, across all criminal history categories and for all offenders, the largest proportion of "recidivating events" that count toward rates of recidivism are supervised release revocations, which are based on anything from failing to file a monthly report to failing to report a change of address.[45] Drug trafficking accounts for only a small fraction – as little as 4.1% – of recidivating events for all offenders.[46]

While it is true that crack cocaine offenders generally have higher criminal history categories than powder cocaine offenders,[47] as the Commission has explained, "African-Americans have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers" because of "the relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished neighborhoods."[48] Indeed, though African Americans comprise only 15% of drug users, they comprise 37% of those arrested for drug offenses, 59% of those convicted, and 74% of those sentenced to prison for a drug offense.[49]

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[42] *Id.* at 83, 87.

[43] Roland G. Fryer, Jr., Paul S. Heaton, Steven D. Leavitt, Kevin M. Murphy, National Bureau of Economic Research, *Measuring the Impact of Crack Cocaine* (May 2005), http://pricetheory.uchicago.edu/levitt/Papers/FryerHeatonLevittMurphy2005.pdf.

[44] USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13 & Ex. 11 (May 2004).

[45] *Id.* at 4, 5 & Exs. 2, 3, 13.

[46] *Id.* at Ex. 13.

[47] USSC, Cocaine and Federal Sentencing Policy 44 (May 2007).

[48] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004).

Because African Americans have a higher risk of conviction than similar White offenders, they already (1) have higher criminal history scores and thus higher guideline ranges, (2) are sentenced more often under the career offender guideline, (3) are subjected to higher mandatory minimums for prior drug trafficking felonies under 21 U.S.C. § 841, and (4) are more often disqualified from safety valve relief. In short, criminal history is already accounted for in a host of ways in individual cases. Building it into every crack cocaine sentence effectively double counts criminal history and exacerbates racial disparity.

No evidence supports raising powder cocaine penalties. Congress should "reject addressing the 100-1 drug quantity ratio by decreasing the . . . threshold quantities for powder cocaine offenses, as" the Commission has found that "there is no evidence to justify an increase in quantity-based penalties for powder cocaine offenses."[50]

C. The Harsh Federal Penalties for Crack Cocaine Offenses Destroy Individuals, Families and Communities, Undermine Public Confidence in the Justice System, and Create a Greater Risk of Recidivism.

Though some maintain that higher penalties for crack offenses protect and benefit African American communities, this claim is unsupportable. Over 32% of Black males born in 2001 are expected to go to prison during their lifetimes if current incarceration rates continue. In 2001, the percentage of Black males in prison was twice that of Hispanic males and six times that of White males.[51] One of every fourteen African American children has a parent in prison, and thirteen percent of all African American males are not permitted to vote because of felony convictions.[52] The harsh treatment of federal crack offenders has contributed to this deplorable situation.

The persistent removal of persons from the community for lengthy periods of incarceration weakens family ties and employment prospects, and thereby contributes to

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[49] *See* Interfaith Drug Policy Initiative, *Mandatory Minimum Sentencing Fact Sheet*, http://idpi.us/dpr/factsheets/mm_factsheet.htm.

[50] *See* USSC, Cocaine and Federal Sentencing Policy 8 (May 2007).

[51] U.S. Department of Justice, Bureau of Justice Statistics, *Special Report: Prevalence of Imprisonment in the U.S. Population, 1974-2001* (August 2003).

[52] *See* American Civil Liberties Union, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law* 3-4, October 2006; Justice Policy Institute, *Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and its Impact on African American Men* 10 (2002); Human Rights Watch & the Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* 8 (1998).

increased recidivism.[53] Reputable studies show that if a small portion of the budget currently dedicated to incarceration were used for drug treatment, intervention in at-risk families, and school completion programs, it would reduce drug consumption by many tons and save billions of taxpayer dollars.[54]

Defenders see the pointless destruction of our clients' lives and families on a frequent basis. Under the statute and guidelines, even a first offender must spend a substantial period of time in prison, cutting off education and meaningful work, and greatly diminishing prospects for the future. The Defender in the District of Columbia recently represented a 22-year-old young man who was working toward his GED and taking a weekly class in the plumbing trade when he was sentenced to prison for selling 7 grams of crack to a cooperating informant. He had no prior convictions or even any prior arrests, no history of drug or alcohol abuse, was in a stable relationship, and had two small children to whom he was devoted. He was a random casualty of an investigation of a serious drug trafficking conspiracy in which he was not involved. A cooperator in that investigation, who happened to live in the same housing project, approached the young man to get him some crack, and he unwisely agreed in order to get cash to support his family. The government prosecuted the client in federal court, not because he was involved in the conspiracy under investigation, but to make a record for its cooperator. If the client had been prosecuted in superior court, he would have received a sentence of probation. If he had been prosecuted in federal court for selling 7 grams of powder cocaine, he would have received a sentence of probation. He is now serving a prison sentence, while the cooperator, who had a very substantial record, was sentenced to time served.

In a case handled by the Defender in Los Angeles, the client was just finishing up a sentence for being a felon in possession of a firearm. He had completed the 500-hour drug treatment program, had served as a suicide watch companion in prison for over a year, had been released to a halfway house, was working full time, and was about to regain custody of his son. On the eve of his return home and just before the statute of limitations would have expired, the government indicted him for a sale of four ounces of crack to a confidential informant, which had occurred seven months *before* the felon in possession offense. In that case, the informant, at the direction of law enforcement officers, rejected the four ounces of powder cocaine the client brought him and insisted on four ounces of crack instead. If the government had indicted the client for both offenses at once, he would have received a concurrent sentence. If the informant had not

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[53] The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005) (hereinafter "*Incarceration and Crime*"), available at http://www.sentencingproject.org/pdfs/incarceration-crime.pdf.

[54] Caulkins, Rydell, Schwabe & Chiesa, *Mandatory Minimum Sentences: Throwing Away the Key or the Taxpayers' Money?* at xvii-xviii (RAND 1997); Rydell & Everingham, *Controlling Cocaine: Supply Versus Demand Programs* (RAND 1994); Aos, Phipps, Barnoski & Lieb, *The Comparative Costs and Benefits of Programs to Reduce Crime* (Washington State Institute for Public Policy 2001), http://www.nicic.org/Library/020074.

insisted on crack, the entire sentence would be wrapped up, the client would be working, and his son would have a parent to care for him. Instead, he is now serving a ten-year mandatory minimum sentence.

In a case handled by the Defender in the Southern District of Alabama, a forty year old mother of three and grandmother of two with no criminal history was convicted of conspiring to distribute crack. The only evidence against her was the uncorroborated testimony of serious drug dealers, one a former boyfriend, who had gun charges dismissed and received lower sentences in return. Her lawyer moved for a mistrial when he learned that the cooperators were placed in the same holding cell and were coordinating their testimony. The witnesses assured the judge that they did not discuss their testimony and the motion was denied. The woman was sentenced to twenty years in prison. Her 20-year-old daughter was forced to leave college to support and care for the family.

II. Aggravating Circumstances, Rather Than Being Built Into Every Sentence for Crack Cocaine Offenses, Should Affect the Sentence Only If Present In The Individual Case, as With Any Other Drug Type.

The aggravating circumstances once thought to be particularly prevalent in or unique to crack cocaine offenses are already available in existing guidelines and statutes applicable to all drug cases.[55] Thus, under the current penalty structure, for crack cocaine offenders, this means that they are being punished once based on an assumption that aggravating circumstances exist in every case even if they do not exist in the individual case, and twice if the aggravating circumstance is actually present in the case.

As with all other drug types, any additional harm in a crack cocaine offense should not be addressed through the blunt instrument of a higher penalty built into the punishment at every quantity level, but by enhancements that may or may not exist in individual cases. Many aggravating circumstances are already available under current law. *See* footnote 55, *supra*. Thus, any directive to the Commission regarding aggravating circumstances should be permissive, giving the Commission wide leeway to independently determine whether any aggravating circumstances should be added and if so, what their effect should be.

III. The Mandatory Minimum for Simple Possession of Crack Cocaine Should Be Repealed.

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[55] *See* USSG § 2D1.1(b)(1) (actual possession of a weapon by the defendant or access to a weapon by an unindicted participant); 18 U.S.C. § 924(c) (consecutive mandatory minimum if weapon was possessed, used or brandished); USSG § 4B1.3 (offense was part of a pattern of criminal livelihood); USSG Chapter Four (criminal history score); USSG § 3B1.4 (use of a minor); USSG § 3B1.1 (aggravating role); USSG § 2D1.2 (sales to pregnant women, minors, or in protected locations); USSG § 2D1.1(a) (death or serious bodily injury); USSG § 5K2.1 (death); USSG § 2K2.2 (bodily injury); USSG § 3C1.1 (obstruction of justice).

Congress should repeal the mandatory minimum for simple possession of crack, so that the penalty for simple possession of crack is the same as that for simple possession of powder cocaine, as the Commission has unanimously and repeatedly recommended.

IV. Mandatory Minimums for All Drug Offenses Should Be Repealed.

Seventeen years ago, the Sentencing Commission found that mandatory minimums create unwarranted disparity and unwarranted uniformity, and transfer sentencing power from impartial judges to interested prosecutors.[56] Mandatory minimum statutes result in sentences that are unfair, disproportionate to the seriousness of the offense and the risk of re-offense, and racially discriminatory. The Commission, in its Fifteen Year Report, detailed many of these problems with support from many sources, including evidence from the Department of Justice "that mandatory minimum statutes [are] resulting in lengthy imprisonment for many low-level, non-violent, first-time drug offenders."[57] The Commission concluded: "Today's sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation."[58]

The Commission recently reported that in 2006, Black offenders were the only racial group comprising a greater percentage of offenders convicted under a mandatory minimum statute (32.9%) than their percentage in the overall offender population (23.8%). In drug cases, only Hispanics and Blacks comprised a greater percentage of offenders convicted under a mandatory minimum statute (42.4% and 32% respectively) than their percentage in all drug cases (41.7% and 29.2% respectively).[59]

Today, there is a solid consensus in opposition to mandatory minimums among an ideologically diverse range of judges, governmental bodies and organizations dedicated to policy reform, including the Judicial Conference of the United States, the U.S. Conference of Mayors, the American Bar Association's Justice Kennedy Commission, and Justice Kennedy himself.[60] According to the Constitution Project's Sentencing

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[56] *See* USSC, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (1991).

[57] *See* USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 51 (2004), citing U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994).

[58] *Id.* at 135.

[59] *See* Statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission, Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee 3, 12 (June 26, 2007).

Initiative, chaired by former Attorney General Edwin Meese III, "Experience has shown that mandatory minimum penalties are at odds with a sentencing guideline structure."[61]

V. A Pilot Program For Federal Substance Abuse Courts As a Sentencing or Pretrial Diversion Option Should be Established.

We urge Congress to establish a pilot program for federal substance abuse courts that would be available as a sentencing or pretrial diversion option. Substance abuse or addiction is a contributing cause not only of simple possession, which comprises only 2.9% of federal drug offenses, [62] but of drug trafficking and many other federal crimes.

The Benefits and Cost Savings of Substance Abuse Treatment and Substance Abuse Courts Are Well Established. Experts are in agreement that substance abuse treatment is far more cost effective than incarceration. Incarceration diminishes the ability to get a job, to be a parent and to be a productive member of the community, which in turn increases the risk of recidivism and the costs to the criminal justice system and society as a whole.[63] According to the National Institute on Drug Abuse, every dollar spent on effective treatment yields a $4 to $7 return in reduced drug-related crime, theft and criminal justice system costs, and the return is even greater when health care savings are taken into account.[64] According to a report prepared for the Office of National Drug Control Policy, each dollar spent on cocaine treatment yields $7.48 in societal benefits.[65]

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[60] *See* Statement of Hon. Paul J. Cassell Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee on Behalf of the Judicial Conference of the United States (June 26, 2007); U.S. Conference of Mayors, Resolution Opposing Mandatory Minimum Sentences 47-48 (June 2006); American Bar Association, Report of the ABA Justice Kennedy Commission (June 23, 2004); Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting at 4 (Aug. 9, 2003); Leadership Conference on Civil Rights, Justice on Trial (2000); Federal Judicial Center, The Consequences of Mandatory Prison Terms (1994).

[61] Constitution Project, Sentencing Initiative, Principles for the Design and Reform of Sentencing Systems: A Background Report 12 (June 7, 2005).

[62] USSC, 2006 Sourcebook of Federal Sentencing Statistics, Table 3.

[63] Doug McVay, Vincent Schiraldi, & Jason Ziedenberg, *Treatment or Incarceration: National and State Findings on the Efficacy of Cost Savings of Drug Treatment Versus Imprisonment* (March 2004), Justice Policy Institute Policy Report; National Institute on Drug Abuse, *Principles of Drug Abuse Treatment for Criminal Justice Populations*, National Institutes of Health (2006); *National Treatment Improvement Evaluation Study 1997 Highlights* (March, 1997) Washington, D.C.: U.S. Department of Health and Human Services, Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration.

[64] Rutledge, Josh, *Drug treatment urged in criminal justice, Report cites lower society costs*, The Washington Times, 25 July 2006.

[65] Rydell, C.P. & S.S. Everingham, *Controlling Cocaine* (1994).

Many states have adopted substance abuse court programs as a sentencing or pretrial diversion option. There are two typical approaches: (1) deferred prosecution (diversion) programs in which the participant does not plead guilty or judgment is withheld pending successful completion of (or failure in) the program; and (2) programs in which the participant pleads guilty, but the sentence is deferred or suspended pending successful completion of (or failure in) the program.[66] In February 2005, the GAO submitted a comprehensive report on adult drug courts. The GAO based its conclusions on twenty-seven evaluation studies. It found that the majority of studies revealed that drug courts resulted in reduced recidivism rates for all felony and drug offense participants.[67] Re-arrest and re-conviction rates for participants were below those of the control group.[68] Other studies show that drug court programs reduce recidivism, keep offenders employed and with their families and in their communities, and save taxpayer dollars that would otherwise be wasted on ineffective incarceration.[69]

Federal Substance Abuse Courts Have Been Highly Successful But Are Available Only After A Sentence of Imprisonment Has Been Served. The Sentencing Commission, based on findings that lower recidivism rates correlate with abstinence, employment and education, has advised that rehabilitation programs that include substance abuse treatment, job training, and/or the pursuit of a degree would have a high cost-benefit value. USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 12-13, 15-16 & Ex. 10 (May 2004).

However, such programs are available in the federal system only after the offender has already completed what is usually a lengthy prison sentence. These programs (of which there are currently only five) have been highly successful.[70] Participation is voluntary and results in a reduced term of supervised release upon successful completion of a total of fifty-two weeks. Participants meet regularly as a group with the federal magistrate and/or district court judge in charge of the program. The judge assigns each person goals to achieve between meetings, and each person must stand up and account for what they have accomplished or not accomplished to the judge

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[66] GAO Report to Congressional Committees, Adult Drug Courts, Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes at 36, Feb. 2005 ("GAO Report").

[67] *Id.* at 44.

[68] *Id.* at 45, 49.

[69] Ryan S. King, *Changing Direction? State Sentencing Reforms 2004-2006* (March 2007), http://www.sentencingproject.org/Admin/Documents/publications/sentencingreformforweb.pdf.

[70] Substance abuse courts are currently in operation in three districts, and "re-entry courts" are in operation in two other districts. No legislation was needed for these programs. They were implemented by Probation Offices, District Courts, and Defenders, with the assent of U.S. Attorneys. Legislation is needed, however, to create such programs at the front end.

and the entire group. They must, among other things, remain sober and be employed. When issues arise, treatment may be changed (*e.g.*, the person may be required to live in a sober house because her home environment does not support recovery), and/or graduated sanctions imposed (from writing an essay to community service to curfew to docking weeks from the 52-week calculation to a weekend or up to 7 days in jail).

A study conducted by the Federal Drug Court Team in the District of Oregon compared a control group with drug court participants, and found that (1) drug court graduates completed treatment at a rate 83% higher than the control group, (2) drug court graduates were 11% less likely to submit a positive urinalysis and 52% more likely to disclose drug use prior to testing, and (3) all drug court graduates paid restitution, while none of the control group did. In Oregon and other districts, judges, defenders and probation officers report that these programs work because of individual attention from the judge, the award of incentives, the imposition of sanctions, and peer pressure and support from others who are succeeding in the face of the same problems. Six other district courts are opening similar programs within the next few months, and proposals are pending in four other districts.

The success of these programs demonstrates that prison first, drug courts only later, is insufficient. Participants are still addicted when released because most prisoners receive no treatment in federal prison. Spending years in prison makes recidivism more likely by breaking up families and making offenders less employable. If offenders were given the tools and incentives on the front end, recidivism would be reduced at less cost.

These programs also demonstrate that there is much to gain by making participation available to a wide range of offenders. In the first class of ten who recently graduated successfully in the District of Massachusetts, one was convicted of delay of the mail, one of possession of a firearm with an obliterated serial number, two of bank robbery, and six of drug trafficking (two crack cocaine, one powder cocaine, two heroin, one marijuana). Three graduates had 0-1 criminal history points, three had 2-3 criminal history points, and four had 13 or more criminal history points.

The Establishment of Federal Substance Abuse Courts is Necessary to Avoid Unwarranted State/Federal Disparity, to Rehabilitate Federal Offenders, and to Save Federal Resources. The existence of drug courts in the state system but not the federal system in the same district creates unwarranted disparity. Federal authorities can and do take cases from state court, where sentences are generally lower and drug courts are available. As often as not, this has nothing to do with the seriousness of the offense. Funding more state drug courts without creating federal substance abuse courts would perpetuate this unwarranted federal/state disparity. The establishment of federal substance abuse courts would remove this source of unwarranted disparity, rehabilitate federal offenders, and save federal dollars.

Pretrial Diversion is Available in the Federal System But Only for Simple Possession and Substance Abuse Treatment is Not Required. "Pre-judgment probation" is available under 18 U.S.C. § 3607 for a person found guilty of simple

possession under 21 U.S.C. § 844 who has no prior controlled substance conviction. The judge may place the person on probation for not more than one year, and must dismiss the proceedings without entering judgment if the person does not violate a condition of probation. In addition, the United States Attorneys' Manual provides that a prosecutor may decline to charge, or dismiss charges, upon completion of a period of supervision. This "pretrial diversion" procedure is not available to anyone who is an "addict," or who has two or more prior felony convictions. USAM § 9-22.100.

The Department's Objections to Federal Drug Courts Are Unsupported. The Department of Justice claims that federal drug courts are inappropriate because the federal system "deals overwhelmingly with drug trafficking defendants who have committed more serious drug trafficking offenses, are often violent, and are not eligible for, or amenable to, drug-court-type programs." DOJ Report to Congress on the Feasibility of Federal Drug Courts 1 (June 2006). While serious and violent drug trafficking may be what Congress had in mind for the federal system, the reality is that most federal drug defendants are low level, non-violent street dealers, couriers, and users.[71] These offenders are amenable to substance abuse treatment, as are other types of federal offenders who suffer from addiction and whose crimes are often inextricably linked to addiction.

The Department also claims that "federal programs during pretrial release, incarceration, and supervised release, are already available as an alternative to a new federal drug court program." *Id.* This is inaccurate. While some defendants *can* receive treatment during pretrial release, *if* they are released, they are not required or allowed to participate for 52 weeks, the time it takes for a successful result. Thus, there is no effective federal drug court program available on the front end where it could do the most good and save the most resources.

The Department's claim that treatment is available during incarceration is largely inaccurate. After Congress created the residential drug and alcohol program, *see* 18 U.S.C. § 3621(e)(2)(B), the BOP, by unilateral regulation, placed many restrictions on the ability to obtain the one-year sentence reduction, thus removing the incentive to participate that Congress intended. Those convicted of being a felon-in-possession, no matter how non-violent, are ineligible. Those who received the two-level weapon

[71] Over 51% of federal drug offenders have 0-1 criminal history points and over 83% had no "weapon involvement," broadly defined as anything from use by the defendant to mere access to a weapon by an un-indicted co-participant. *See* U.S. Sentencing Commission, 2006 Sourcebook, Tables 37, 39. The largest proportion of powder cocaine offenders are mules and the largest proportion of crack cocaine offenders are street level dealers. *See* USSC, Cocaine and Federal Sentencing Policy 19 (May 2007). A study by the Department in 1994 found that a substantial number of federal drug offenders played minor functional roles, had engaged in no violence, and had minimal or no prior contacts with the criminal justice system, and that this was a waste of taxpayer dollars. U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994), available at http://fd.org/pdf_lib/1994%20DoJ%20study%20part%201.pdf.

enhancement under the drug guidelines are ineligible, thus excluding many who were convicted of a drug offense in which a gun was merely possessed or accessible to someone other than the defendant. Anyone with certain crimes of violence in his criminal history, no matter how old, e.g., a 30-year-old bar fight, is ineligible for the reduction. These restrictions were not required by Congress.[72]

Similarly, in January 2005, BOP unilaterally terminated the boot camp program enacted by Congress in 1990. The only study of the federal boot camp program showed it to be effective and efficient. Nonetheless, BOP terminated it, without congressional consultation or approval, depriving judges of a mitigating sentencing option that benefited first time non-violent offenders,[73] the very ones DOJ concluded in its own study were receiving unnecessary time and wasting taxpayer dollars.[74]

VI. Alternatives to Incarceration, Including Probation, Should Be Made Available For All Drug Offenses.

Since the Anti-Drug Abuse Act of 1986 and the Sentencing Guidelines, use of punishments options short of incarceration, such as probation, home detention, intermittent confinement and community service, has been greatly reduced. In 1984, over 30% of federal defendants were sentenced to probation without any term of imprisonment.[75] By 2006, only 7.5% of federal defendants were sentenced to straight probation.[76] In 1995, 78.7% of federal defendants received a sentence including a term of imprisonment, and of those, 94% were sentenced to straight prison.[77] By 2006, 88.6% received a sentence including a term of imprisonment, and of those, 96% were sentenced to straight prison.[78]

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[72] The exclusion from early release for those convicted of possessing, carrying or using a firearm was recently struck down because BOP articulated no rationale for categorically excluding such prisoners. *Arrington v. Daniels*, __ F.3d __, 2008 WL 441835 (9th Cir. Feb. 20, 2008).

[73] Update on BOP Issues Affecting Clients Before And After Sentencing at 5-6, http://or.fd.org/BOPNotesOnIssuesJan07.pdf.

[74] U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994), available at http://fd.org/pdf_lib/1994%20DoJ%20study%20part%201.pdf.

[75] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 43-45 & Fig. 2.2 (2004).

[76] USSC, 2006 Sourcebook of Federal Sentencing Statistics, Fig. D & Table 12.

[77] USSC, Annual Sourcebook of Federal Sentencing Statistics, Table 18.

[78] USSC, 2006 Sourcebook of Federal Sentencing Statistics, Table 12.

We do not believe that it is necessary or advisable that fully 88.6% of all federal offenders serve a prison sentence, or that drug trafficking offenders be excluded from the possibility of a probationary sentence altogether. Incarceration means loss of employment and family support, the two factors most likely to promote rehabilitation and prevent recidivism, and certainly makes future employment more difficult to obtain.

H.R. 5035, by making probation and parole available to cocaine offenders, is a step in the right direction.

VII. Parity in Resources Between Prosecution and Defense is Necessary.

Section 10 of H.R. 4545 would authorize the appropriation of $56,000,000 for salaries and expenses for the prosecution of high level drug offenders. This would result in many additional cases for Defenders and CJA counsel. Defenders handle 75% of federal criminal cases at the trial level. Of the other 25%, the majority are multi-defendant cases, typically drug cases, in which the Defender represents one of the defendants and CJA counsel is appointed for the others.

Prosecutors have vast investigative support outside of their agency and outside of their budget, and have the ability to bring witnesses to their offices. Defense counsel must perform all or much of the investigation themselves. We frequently meet with clients and witnesses in far flung jails and correctional institutions. We may spend an entire day for a brief meeting with one client or one witness. For these and other reasons, it takes more lawyer time to defend a case than to prosecute it. Because of budgetary constraints and hiring freezes, there has been no appreciable increase in Defender hires over the past few years, though our caseload increases annually.

The Sixth Amendment guarantees every indigent defendant the right to appointed counsel and every defendant the right to effective assistance of counsel. *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *Strickland v. Washington*, 466 U.S. 668 (1984). Defender Offices, already strained, cannot provide effective representation if their caseloads are substantially increased. Thus, if the prosecution's budget for drug cases is increased, a corresponding increase for the defense is necessary.

VIII. Congress Should Reject the Department's Efforts to Reverse the Progress Made by the Commission and to Divert Congress from Enacting a Comprehensive Solution.

A. Recent Claims About the Number of Prisoners Who Will Be Released And When Due to the Retroactive Amendment Are Inaccurate.

Representations were made at the Senate hearing that there was going to be a "mass release" of 10% or 25% of the federal prison population as a result of the retroactive amendment. This is not so. The federal prison population is approximately

200,000 today.[79] The Commission estimates that due to the retroactive amendment, approximately *19,500* people are going to be released *over the course of thirty years*.[80]

These defendants, of course, were going to be released in any event, and in most cases not much later. According to the Commission, two thirds will receive a sentence reduction of two years or less. *See* USSC, Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive, Table 6 (28.6% with 0-12 months reduction, 34.9% with 13-24 months reduction, 18.7% with 25-36 months reduction, 9.9% with 37-48 months reduction, and 7.9% with 49+ months reduction).

The Commission estimates that, across 94 judicial districts, 1508 prisoners will be due for immediate release on March 3, a number that is probably overstated, as many of these prisoners have been released after serving their full original sentences. Nearly 70,000 people are released from federal prison annually.[81] A few more, who have already served sentences that are greater than necessary to serve legitimate sentencing goals, is hardly a "mass release."

B. The Department's Representations About the Dangerousness of this Population Are Unsupported.

The Attorney General's claims that "nearly 80 percent of the offenders who will be eligible for early release have a criminal history of II or higher," and that "many of them will also have an enhanced sentence because of a weapon or received a higher sentence because of their aggravating role" answers itself: Increases for criminal history,

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[79] *See* http://www.bop.gov/news/quick.jsp#1. Due in large part to the draconian federal drug sentencing laws, it has increased from 44,408 in 1986, and 48,300 in 1987. *See* Katherine M. Jamieson and Timothy Flanagan, eds., *Sourcebook of Criminal Justice Statistics 1988* Table 6.34, Department of Justice, Bureau of Justice Statistics, Washington, DC: USGPO, 1989.

[80] *See* USSC, Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive, Table 7; http://www.ussc.gov/PRESS/rel121107.htm.

[81] The breakdown by offense type is as follows:

Violent offenses 4,343
Property offenses 9,175
Drug offenses 24,971
Public-order offenses 4,627
Weapon offenses 7,089
Immigration offenses 17,526
Missing/Unknown 1,826
Total 69,557

BJS Federal Justice Statistics Program website (http://fjsrc.urban.org)
Data Source: Bureau of Prisons - Extract from BOP's online Sentry System, FY 2006 (as standardized by the FJSRC).

weapon enhancement, or aggravating role adjustment are already included in the sentence and will not be lessened by any new sentence. The Commission's policy statement provides and has always provided that the judge must leave all guideline application decisions other than the amended guideline unaffected. USSG § 1B1.10(b)(1).

As noted above, 94.5% of crack cases in 2005 involved no actual violence, and 89.6% involved no violence or threat of violence. Any violence or weapon involvement is already built into the original guideline sentence and would be built into any new sentence.

The Department's witness has claimed that defendants in Criminal History III have a 34.2% rate of recidivism and that those in criminal history category VI have a 55.2% rate of recidivism. This is false as to crack offenders and drug offenders generally. These are the average rates for *all* types of offenders. For Criminal History Categories II and higher, drug offenders have the *lowest* rate of recidivism of all offenders[82] As noted above, because African Americans have a higher risk of conviction than similar White offenders, they already have higher criminal history scores and thus higher guideline ranges, which they will continue to have with a revised sentence. And they are sentenced more often under the career offender guideline, are subjected to higher mandatory minimums for prior drug trafficking felonies under 21 U.S.C. § 841, and are more often disqualified from safety valve relief, each of which, except in narrow circumstances, will disqualify them from relief altogether.

C. The Solution to Any Legitimate Public Safety Concerns is for the Government to Do its Job, and to Allow Judges to Do Theirs.

If the government believes that any particular prisoner poses a public safety risk, it is invited to bring this to the judge's attention, and judges are required to consider this factor whether or not the government raises it. *See* USSG 1B1.10, comment. (n.1(B)).

There should be few such concerns, however, because the Attorney General's claim that the retroactive application of the amended guideline "will pose significant public safety risks" is contrary to the evidence showing that this population is overwhelmingly non-violent.[83]

Each prisoner released will be under supervision of a U.S. Probation Officer. It is the Probation Officer, not the Bureau of Prisons, who assists the releasee in setting up treatment, and finding a job and housing. If the government wishes to request some additional form of help for a particular prisoner to re-enter society, it may do so.

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[82] USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13 & Ex. 11 (May 2004).

[83] *See* Darryl Fears, Crack Set for Release Mostly Non-Violent, Study Says, Washington Post, Feb. 22, 2008.

D. Repealing or Limiting the Commission's Well-Considered and Unanimous Decision to Make the Crack Cocaine Amendment Retroactive Would Reinforce the Perception of Racial Bias.

Amendments lowering guideline sentences for LSD, marijuana, psylicibin, fentanyl, PCE and percocet, all of which benefited primarily White offenders, were made fully retroactive. *See* USSG App. C, amends. 126, 130, 488, 499, 516, 657. Amendments to the guidelines for fraud, obstruction, escape and money laundering, which likewise benefited primarily white offenders, were made fully retroactive. *See* USSG App. C, amends. 156, 176, 341, 379, 490. The maximum base offense level for drug offenders with the highest sentences allowable was retroactively lowered from 42 to 38, thus lowering the range in Criminal History I from 360 months-life to 235-293 months. *See* USSG App. C, amend. 505. Likewise, the elimination of the two-level weapon enhancement for those convicted and sentenced under 18 USC § 924(c) for using, carrying or possessing a firearm was also made retroactive. *See* USSG App. C, amend. 599. There is surely no reasonable basis to assume that crack offenders are by definition more dangerous than drug trafficking offenders whose base offense levels were the highest allowable or who were convicted of using a firearm.

E. The Department's Claims of Administrative and Litigation Burdens Are Not Consistent With the Facts on the Ground.

The Department witness's claims of undue burden bear no resemblance to what is actually already happening on the ground. District Court Judges, Probation Officers, Defenders, the Bureau of Prisons and U.S. Attorneys' Offices have been working in a spirit of cooperation for the past two months to ensure an efficient and fair process. U.S. Probation has held two summits attended by hundreds of judges, probation officers, defenders, prosecutors and prison officials. Information and ideas were shared, and consensus on issues of consequence was reached. DOJ representatives announced that they would cooperate in the process. It would be a massive waste of resources and goodwill to derail the process now, as the Department urges.

Implementation is already underway and is running smoothly. In the Eastern District of Virginia, which has the largest number of prisoners estimated to be eligible for release (1208[84]), I have worked closely for two months with the Probation Office, the U.S. Attorney's Office, and the District Court to develop fair and efficient procedures to handle these cases. Everyone involved is dedicated to effectively implementing the Commission's unanimous decision. I anticipate that the vast majority of cases will be resolved without any substantial disagreement or litigation. The same apparently can be said for most other districts. At the two summits held by U.S. Probation, representatives of the Federal Defenders were able to report, based on a survey of all Defenders, that they expect over 90% of cases to be resolved without litigation. Thus far, the focus in my district has been on assisting those who may be eligible for immediate release on March

[84] *See* USSC, Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive, Table 8.

3, which appears to include a grand total of 16 people. I have found that the Commission's list is a helpful starting point, but it includes dozens of prisoners who have been released or who are ineligible for one reason or another, and also misses some prisoners who do qualify. The total number of cases and the time it will take to process them will not be unduly burdensome. It will be handled in an orderly and manageable way over a long period of time.

The Western District of North Carolina, where Ms. Shappert is the U.S. Attorney, has only 436 prisoners estimated to be eligible for early release over the next thirty years.[85] The Federal Defender there, Claire Rauscher, also has met with the District Court Judges, the U.S. Probation Office, and representatives from the United States Attorneys Office (Ms. Shappert was not present) regarding plans for implementing the retroactive amendment. Ms. Rauscher expects that the vast majority of cases will be resolved without litigation by either the defense or the government.

Ms. Shappert's claim in her Senate statement that federal defenders issued "guidance" telling defense counsel to argue that "every court should consider not only the two-level reductions authorized by the Commission but conduct a full resentencing" is simply not correct. A legal memorandum was made available to Defenders which addressed litigation issues that may be posed by anomalies in the amended guidelines, individual cases, arguments by the government, and circuit precedent. No uniform policy for every case would ever be promulgated by any representative of the Defenders. This is because Defenders represent individual clients and they adapt to conditions in their various districts.

Notably, Ms. Shappert does not claim that any defendant in her district has filed a motion seeking more than a two-level reduction, or to know of any such motion being filed. She claims concern over the Ninth Circuit's decision in *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007), which held that the policy statement must be advisory in light of the Supreme Court's decision in *Booker v. United States*, 543 U.S. 220 (2005). This decision was issued before the policy statement was amended. Whether it will be applied to the revised policy statement remains to be seen. In any event, only 584 prisoners (2.9%) are estimated to be eligible for release in the entire Ninth Circuit over the course of three decades.

Congress should not repeal retroactivity for the purpose of relieving prosecutors of litigating a small number of cases. Indeed, this would create much more litigation. A statute that retrospectively denied eligibility for a sentence reduction for an easily identifiable group of largely African American prisoners would violate the Article I prohibitions on Bills of Attainder and *Ex Post Facto* laws and the guarantee of Equal Protection of the Laws.

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[85] *See* USSC, Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive, Table 8.

In conclusion, I again thank you for your attention to the urgent and compelling need for reform of the federal cocaine sentencing laws.

Ms. SHAPPERT. Mr. Chairman, in light of the criticism of the Department of Justice, I would respectfully ask an opportunity to respond.

Mr. SCOTT. You will have that opportunity when we get to questions. And I will recognize myself for 5 minutes. And if you would like to answer, you can respond to the criticism.

Ms. SHAPPERT. Thank you.

With regard to the contentions of the Federal defender, let me tell you that the impact on the court system is profound. It is interrupting our ability to prosecute other cases that need to be prosecuted. It is requiring us to re-open cases that have been closed for years.

And as I indicated, we are not on a level playing field in our duty to present to the courts a clear picture of an individual being considered for re-sentencing when we no longer have the witnesses, we no longer have the evidence, and we no longer have the facts.

It is estimated that probably approximately 5,000 of this 20,000 or 19,500 universe of individuals will be eligible for re-entry in the first 2 years. That will have a profound impact on the communities that are most fragile. A huge number of the individuals who have been prosecuted for crack cocaine offenses will be returning to the very communities we are working to help bring back.

Many of these individuals will not have completed re-entry programs. They will not have completed anger management classes. They will not have completed the halfway house programs that are associated with effective re-entry.

And I again reiterate that the definition of violence that limits the universe to only 5 percent of crack offenders as being violent seriously mischaracterizes the situation. When we know that a third of the individuals in this group of people who are eligible for retroactivity either possessed a weapon or used a weapon——

Mr. SCOTT. When would they be getting out without retroactivity? And how much time would they have served already?

Ms. SHAPPERT. Well, it depends, honestly, sir, on the sentence that was imposed upon them. They will get out eventually.

Mr. SCOTT. Judge Walton, how much difference did the Sentencing Commission action make on individual cases that are coming before you? Do you see a profound effect in the sentencing of the individuals who come before you?

Judge WALTON. Not significantly. Most of the people would have been eligible fairly soon in any event. I think it was estimated by the Commission that you would be talking about somewhere between, on average, 24 to 27 months in reduction.

Mr. SCOTT. Out of what kind of sentence?

Judge WALTON. For the sentences like, in many situations, Mr. Short received. And I think his situation——

Mr. SCOTT. These people would have served 10 years. Instead of getting out in 12 years, they might get out in 11 years?

Judge WALTON. Many of them—that would be the case. And Mr. Short's situation is not unique. And I think it is just a waste of the taxpayers' money to keep somebody like Mr. Short locked up for as long as he was locked up. I will be the first to tell him that he should have been punished significantly. And he should have been punished. I understand that. But to keep somebody locked up for

as long as we kept him locked up, who could have come back into the community and been a positive contributor to society, I think is a loss to the community where he comes from.

[Applause.]

Mr. SCOTT. If someone is going to take advantage of a retroactive application of the Sentencing Commission's actions, is that automatic? Or does it have to come before a court for re-sentencing?

Judge WALTON. It is not automatic, and I can tell you that I, and I believe my colleagues, feel the same way. If we have evidence indicating that someone poses a risk to the community, we will not grant them that reduction. I have three cases on my desk right now. When I get back, I am going to look at them. But the United States attorney has agreed that reductions are appropriate.

And that is happening throughout country, where prosecutors are weighing in, and they are saying, "We think the sentence that the person has already served is adequate," and therefore, they are not opposing the reduction.

Mr. SCOTT. Now the Sentencing Commission essentially ascertained that the sentences that have been given in the past have been essentially racially discriminatory and irrational. Now, Ms. Shappert, why should people continue to serve such a sentence, particularly when, if the retroactivity is going to be applied, it has to be applied on an individual basis, with a judge making the decision that in this individual case, it is an appropriate thing to do?

Ms. SHAPPERT. For two reasons. For one that Judge Walton alluded to, that if there is evidence, the court will be able to make an accurate determination. But as I indicated earlier, that evidence may no longer exist, because if the file has been closed, if the evidence has been destroyed because the case was over, the prosecutor will not have the ability to give a clear picture to the judge.

The second reason is if you look at the universe just of individuals who are going to be immediately eligible for release, of that group, approximately 34 to 55 percent are likely to recidivate within 2 years. Because of the——

Mr. SCOTT. Now, wait a minute. They are going to be getting out shortly anyway.

Ms. SHAPPERT. They are going to be getting out, and they are more likely to be recidivists. They will not have had the re-entry programs that would otherwise be available, and they are going to create a risk to the community.

Mr. SCOTT. Judge Walton, if someone is getting out eligible for re-entry, would you consider whether or not they had taken advantage of transitional resources?

Judge WALTON. Absolutely. And one of the things that we are going to try and do is if we have halfway house capability available, as a part of the release order, they will be ordered to serve a certain period of time in a halfway house before they are actually released into the community.

Mr. SCOTT. My time has expired.

The gentleman from North Carolina?

Mr. COBLE. Thank you, Mr. Chairman.

Good to have all of you witnesses with us today.

Ms. Shappert, what is the department's position with regards to first-time non-violent offenders, who will be eligible for release next

Monday—A. And does the department know how many of the roughly 1,600 offenders fall into this category?

Ms. SHAPPERT. To answer the first part of your question, we are interested in a dialogue between the Congress. That is why I am here to deal with that issue. We respectfully submit that the legislation that would go into effect on March 3rd needs to be tolled, to be stopped, so that we can sort through this process, because it is imperative that there be a discussion of how crack offenses should be considered.

As the attorney general recently stated in reviewing retroactivity, the department is receptive to scrutinizing first-time offenders, individuals with no criminal history, for retroactive treatment in a way that would be different than for those with aggravated criminal histories, lengthy sentences and guns and management enhancement roles.

So we submit that there needs to be a dialogue and a decision by the Congress to refine the process.

With regard to how many of those who will be immediately eligible are first offenders, I will have to get back with you to get you that statistic.

Mr. COBLE. I would like that. I would appreciate that.

Ms. SHAPPERT. Yes, sir.

Mr. COBLE. Judge Walton, you testified that the Judicial Conference opposes the current 100:1 ratio. Would 20:1 ratio be appropriate?

Judge WALTON. Mr. Coble, we have not taken a position as to what the disparity, if there is a disparity, should be. We feel that that is a legislative decision that Congress has to make, and the conference has not taken a position on that.

Mr. COBLE. Thank you, sir.

It is my understanding, Judge, that those offenders with a category six criminal history have a 50 percent likelihood to re-offend, and perhaps to be re-incarcerated. Is this likelihood to re-offend taken into account when sentencing a defendant—A. And B, will this also be taken into account when re-sentencing offenders under the commission's ruling?

Judge WALTON. Absolutely. What we are going to be getting from our probation department, if we don't still have a probation report, which will reflect if there was violence associated with the offense for which they were before the court—we will have that information, plus we will be getting from the Bureau of Prisons the institutional adjustment of the individual. And if there is indication that the person has been engaged in infractions, that will be taken into account in deciding whether the reduction should be appropriate.

Mr. COBLE. Thank you, sir.

Mr. Cassilly, describe, if you will, examples that constitute category one versus category six.

Mr. CASSILLY. What?

Mr. COBLE. Or Ms. Shappert, if you waive.

Mr. CASSILLY. I think Ms. Shappert would be better at this.

Mr. COBLE. Okay.

Ms. SHAPPERT. Category one criminal history would be somebody who had no criminal history points or one point. Criminal history

category six would be 13 points or more. It is a compilation of the different offenses that an individual has been convicted of.

Category six offenders are typically the most aggravated category of offenders. They are typically the people who have numerous crimes on their record, such as robbery, other drug crimes, crimes of violence. That would typically be category six.

Mr. COBLE. Let me give you another bite of the apple, Mr. Cassilly. You mentioned in your testimony the connection between crack use and prostitution. What would be the age range of women engaging in prostitution to support their drug addiction?

Mr. CASSILLY. Basically, we are running into crack users that are in their early teens—I mean 14 and 15—and we are running into problems with women that young getting involved in prostitution.

Mr. COBLE. Is the use of crack cocaine linked to other crimes generally and violent crimes specifically?

Mr. CASSILLY. The studies have shown that it is linked to other crimes. Part of the issue is the nature of the use of crack. Crack users tend to want to re-administer because of the intensity of the high and the fact that they are crashing, so that they tend to first of all not want to go too far from their crack dealer, which is the effect on the community.

The powder cocaine users tend to buy and take home or take into another community, whereas crack users tend to stay within the community where the crack is available, use in that community, steal or rob or prostitute within that community where their dealer is located so that they can go back, re-acquire. As soon as they have got the money, they are back to the dealer, and they are buying again.

And that is why you see that impact where the crack dealers are located. That is the effect. That is the blight on the community, because the crimes that are committed in order to obtain the crack are committed in those communities. They don't leave those communities to go offend somewhere else and then take the time to come back. And that is what we see—that the prostitution is committed close to where the dealer is located.

Mr. COBLE. Thank you, all of you.

And thank you, Mr. Chairman.

Mr. SCOTT. Thank you.

The gentleman from Texas, Mr. Gohmert?

Mr. GOHMERT. Thank you, Mr. Chairman.

And again, I appreciate not only your testimony, but your patience throughout this process. I know it hasn't been easy, dealing with the delays and what not.

But coming into this hearing and hearing some of the goings on around this hearing and even hearing what sounds like angry statements about this bill, I get the impression there were people that came in here thinking, "Gee, you know, this was a racist law passed in 1986. Those mean White racists that passed this should be tarred and feathered."

And when you go back, there is no way you are going to convince me that people like Charlie Rangel, Major Owens, Mickey Leland, Harold Ford, Sr. didn't care deeply about the African American communities and individuals that would be affected. They believed. I believe all of those did.

Seventeen of the 21 African American House members believed with all their heart that getting tough and pushing this through, as they co-sponsored this through—and as President Reagan said, people like Charlie Rangel were the champion of getting this through—they believed that being tougher on crack cocaine was going to help save African Americans. I know that is what they believed. They wouldn't have done this otherwise.

But the problem is it has been done for 20 years. It certainly doesn't appear to have saved African Americans or communities that have been so adversely affected before and after. And so, Ms. Shappert, you were talking about this, but I am still wondering what is going to help keep African Americans off of crack cocaine? The tougher sentences didn't work.

Ms. SHAPPERT. Well, first of all, we don't ever prosecute based on race. We prosecute based on conduct.

Mr. GOHMERT. And I would never say that you—I wasn't alleging that.

Ms. SHAPPERT. And I don't take offense to that, but I just want to make that clear for the record.

Mr. GOHMERT. Right.

Ms. SHAPPERT. And vigilance is the price we pay for freedom. I will tell you in that in communities where we have weed and seed sites, for example, where we have gone in and partnered with the leadership in the community, where we bring in prosecutors and prosecute aggressively and then seed in community services, we have dramatically cut the rate of violent crime.

When you bring down the crack usage, when you bring down the crack distribution, you bring down the violent crime. And I am here to speak on behalf of those communities that are victims of this kind of crime. That is why we need to be vigilant.

The discussion needs to be what changes can we make in the law to assure that we are meeting our responsibilities to protect those communities, as well as to treat offenders fairly?

Mr. GOHMERT. Well, if this bill is basically brought, addressed the distribution of crack and being tough on them, then I am not sure. Are you saying that this has helped cut down on crack cocaine?

Ms. SHAPPERT. I am saying that the Department of Justice recognizes that the 1986 law has been called into question, based on subsequent findings, subsequent results. We are here to discuss that ratio. We believe that there is a difference between crack and powder in the consequences for communities and that this discussion must be made in the context of retroactivity and the changes the Sentencing Commission has proposed that should be retroactive.

We think this needs to be an omnibus package. We think this dialogue needs to be extended, and we think that that discussion——

Mr. GOHMERT. I tell you omnibus packages, especially to do with criminal law, would scare me, but just in my 3 years here and a former judge, I look at omnibus packages, and to me they usually mean there is stuff in here we could never get passed any other way, so we will call it an omnibus and stuff the bad stuff in there.

Ms. SHAPPERT. How about wholistic? A wholistic approach, recognizing——

Mr. GOHMERT. Well, that sounds so much better.

Ms. SHAPPERT. Thank you. [Laughter.]

Seriously, we recognize that we have a rare opportunity to deal with this now. We are asking the Congress to toll the decision of the Sentencing Commission, which will go into effect March 3rd, to give us time for discussion and to——

Mr. GOHMERT. My time is about to expire, and I did want to ask Judge Walton.

And thank you.

But, Judge Walton, you were talking about sentencing. And I don't know when you went on the Federal bench. I forgot.

Judge WALTON. 2001.

Mr. GOHMERT. Yes. But you may remember back in 1983 when the Sentencing Commission came into being, Federal judges were outraged—"You took away my discretion!" And now I talk to too many Federal judges going, "And it is not a bad thing, because I don't have any discretion. I don't have to think."

One of the toughest things I did as a judge was having to make the right decision in a sentencing case. Tough to use your discretion as appropriate. But I wanted that discretion as a judge, to have the range and then let me make the call. And I didn't know if, sitting next to the Chairman here, how you felt about the Sentencing Commission. You have got a free shot at him, if you want it. [Laughter.]

Judge WALTON. He is my good friend.

Mr. SCOTT. I want some of your 5 minutes, if you don't mind.

Judge WALTON. As a judge, I like to think. And I like a certain level of discretion. I was not one of those judges who believed that the Sentencing Commission was all bad. I believe that some restraint on discretion is appropriate. I think we have probably reached the appropriate balance at this point, because I do have a sentencing guideline, so I can consider those in assessing a range that is appropriate.

But in appropriate cases, I can go above, if I think it is appropriate, and I can go below, if I think it is appropriate, provided I am not constrained by mandatory minimums.

Mr. GOHMERT. My time has run out. The Chairman advised me we have got another round of questions, so I will get to give them.

Chairman, I am going to host some of my time in a moment.

Mr. SCOTT. Or maybe the Chairman will. [Laughter.]

Well, let me just say for the record, nobody is accusing anybody back in 1986 of racially discriminatory motives. But as Judge Walton has pointed out, we know more now than we did then, and there is clearly a racially discriminatory impact on the continuation of the law such that the Sentencing Commission has pretty much concluded that the present laws are not only irrational, but in effect racially discriminatory.

Now, Judge Walton, if the idea is to get people to stop using crack, have you seen any evidence that people are using powder rather than crack because of the draconian sentences on crack that do not apply to powder? Do people make the decision, "Well, I am

not going to use crack; I am going to use powder, because the sentences are less?″

Judge WALTON. I can't say that I have seen that. I think it is a matter of economics. And crack cocaine is cheaper, and therefore, it is more readily available because of it.

Mr. SCOTT. But people haven't modified their behavior based on the fact that you can get 5 years mandatory minimum for five grams of crack and 500 grams of powder are necessary to trigger the same mandatory minimum. You haven't seen people make what would be a logical choice—use powder rather than crack. You haven't seen that, have you?

Judge WALTON. I have not.

Mr. SCOTT. You have kind of been a little slippery on what the five grams of crack—you get 5 years mandatory minimum for simple possession of crack. Is that right?

Judge WALTON. That is correct.

Mr. SCOTT. How much powder would you have to have to trigger 5 years mandatory minimum for simple possession only, not distribution?

Judge HINOJOSA. There is none, because there is no mandatory minimum for simple possession of powder, Congressman.

Mr. SCOTT. So if it is just possession, there is no mandatory minimum at all.

Judge HINOJOSA. No mandatory minimum.

Mr. SCOTT. However, for crack it is five grams. Now, I heard somebody allude to how much people consume in a weekend or week. How much? What does a user for crack—was it a day's worth, a month's worth?

Mr. CASSILLY. Those were DEA figures based on a month's use.

Mr. SCOTT. So a month would be—what did you say?

Mr. CASSILLY. They estimated, depending on the level of addiction, between 13 and 66 grams per month.

Mr. SCOTT. And for powder?

Mr. CASSILLY. For powder they estimated two grams per month for an average user.

Mr. SCOTT. So you would have to have 250 months' worth of powder to distribute for 5 years mandatory minimum, but less than a month's worth of crack.

Mr. CASSILLY. I agree. I think that the figure for the mandatory minimum under the Federal sentences is way off. In just my own state, it would be 10 times that amount for crack for a mandatory sentence to kick in.

Mr. SCOTT. Okay.

Judge Hinojosa, much has been said about the difference in crack and powder—some with violence and firearms and robbery and everything else. Can the Sentencing Commission make appropriate individualized enhancements based on conduct, rather than generalities, so that if somebody is dealing in crack and used a firearm, they would get more, or if they were violent, they would get more, whereas someone who—and the same with powder, if you are violent, if you have got a firearm and all of that—can you make enhancements to individualize and appropriately tailor the punishment based on individual conduct?

Judge HINOJOSA. We could, but the guidelines presently provide an enhancement for anybody who possesses or has relevant conduct with regards to a dangerous weapon, for aggravating role. This whole issue of criminal history—of course, it is taken into account. The higher the criminal history, the higher the sentence.

In some cases you are at criminal history six because you are a career offender, which therefore means that in all likelihood you are not going to qualify for any retroactive application here. And all of these factors do get taken into account. They have given people higher sentences and will continue to do so under the guidelines system.

We also have a statute that allows for the government to bring the charge under Title 18, Section 924(c), to make sure that somebody gets an additional sentence in addition to the drug sentence.

The whole issue about danger to the communities—we cannot ignore the fact that all drugs are a danger to some community. The fact that crack, in the opinion of some, limits itself to the particular crack community where someone had dealt in crack or had passed crack to someone else is no different than the powder or the heroin that ends up hurting some other community, because in that community where it ends up, you are going to have the same situation with regards to people going into prostitution, people causing harm within the community with regards to stealing.

We cannot separate the fact that there is some community that is affected by the use of some drug and the trafficking in some drug. And the fact that it affects a certain community doesn't mean that we should lose sight of the fact that is there really this 100:1 ratio that should apply just because it is not that particular community, as opposed to a community some other place from where the drug went through.

And I do hope that at some time I can answer Congressman Gohmert's question.

Mr. SCOTT. Go ahead.

Judge HINOJOSA. Can I?

Mr. SCOTT. Yes.

Judge HINOJOSA. You know, Congressman, I am a Longhorn, but I have actually been on the bench 25 years. I did 5 years of sentencing with no guidelines. That was a very difficult thing to do. I have done about 20 years with guidelines. That is a very difficult thing to do. It has not lessened the burden. What it has done—it has made this a fairer, more due process oriented system.

I used to sentence people and consider the fact that they had a gun, the fact that I thought they had played a role in the particular offense, the type of drug and with regards to the amounts involved, whether they had used violence, whether they had prior histories. I didn't have to tell them that I was doing that.

Under the guidelines system, I still have the discretion to apply those enhancements, but I have an open dialogue between the government and the defense knowing that I am considering that. And then I have the discretion. And it is more work. I will say that, because any system that is more transparent requires more work.

It was certainly much easier, except for it was still hard to make the decision, but it was much easier for me to get on the bench and say, "Okay. Your sentence is 5 years or probation or whatever"

without having to go through this open, fair discussion that the Sentencing Reform Act of 1984 brought into being.

But it has made it no easier from the standpoint of having to make the tough decisions, but I still have the discretion to make the fact finding with regards to the enhancements, but it is a much fairer system, because I have allowed the prosecutor and the defense to address the issues that are important to them and then I make the decisions without just coming on the bench, as I did for 5 years, having the difficult decision to make without as much an open discussion.

Thank you.

Mr. SCOTT. Thank you.

Judge Gohmert?

Mr. GOHMERT. Thank you.

And I appreciate you alluding again to your being a Longhorn. I didn't know if you were looking for sympathy for a disability or what. [Laughter.]

Judge HINOJOSA. I will take anything today. But I will say that sentencing is hard, and you know that. It is hard under any system. And I say this not because I am the chair of the Sentencing Commission, but because I am in a border court, and I sentence a lot of people. And I find this a fair system.

Mr. GOHMERT. Well, and then I will take the next question back to you. The possibility has been mentioned in trying to equalize sentences. What about raising the level of sentence for powder cocaine to that the same as crack, instead of going the other way? What are your thoughts about that?

Judge HINOJOSA. In all the hearings that we have held through the years at the commission, we have had no support from anyone who says that the powder penalties right now are too low. It has been difficult for us to hear from people that powder penalties are too low. I know that in the spirit of compromise that might be appealing to some, but we ask you please don't do that just for the sake of compromise, because increasing someone's penalties for the sake of reducing some really doesn't solve the problem.

The crack ratio needs to be looked at individually and separately, and we have heard no interest in increasing the penalties for powder by lowering the amount that you get to the mandatory minimums.

Mr. GOHMERT. Mr. Cassilly, you had alluded to that earlier that maybe that would be the way to go. Could you elaborate on that a little bit? What did you base that on?

Mr. CASSILLY. Well, Congressman, I really think that first of all in terms of Federal sentencing, I agree that the whole Federal emphasis really should be more on distribution and possession with intent to distribute and get away from people that are in simple possession.

I serve on our Drug Court Commission in the State of Maryland. I really think that the emphasis for people in possession—you are users; you are addicts—should be first and foremost for treatment and that the Federal emphasis should be more on going after the drug sellers and dealers.

And to the extent that the Federal net is catching people that are in possession, then we need to look at that and move them into the

state courts, where there are probably more treatment resources, and focus the Federal system on the dealers.

But then if we are going to focus on drug dealers and people who possess with the intent to distribute drugs, then I really think that there should be more of an emphasis, too, on the powder dealers and bringing them up to where they are treated the same way as crack dealers.

Mr. GOHMERT. And Mr. Short, I appreciate your being here. You are a great example of someone who can overcome, and what is heartbreaking is to see how many do end up going to prison, whether it is crack or powder, and then they come up and they get right back into it.

And I have had people that wanted to get out of it, but they ended up being drawn back to it. And I am told it is such an incredible feeling that once you have had it, you just yearn to have it. How long have you been clean now?

Mr. SHORT. I wasn't a drug user.

Mr. GOHMERT. Oh, you weren't. You were just distributing.

Mr. SHORT. Yes.

Mr. GOHMERT. I see. Well, then that would make it easier to kick the habit, if you didn't have it. [Laughter.]

But here again, I take it from your appearance here, from the things you say, your sincerity, that you did learn a valuable lesson and you are not distributing. You see the damage that has been done, and apparently the President understood that sincerity as well.

So do any of you have a suggestion as to what point an amount becomes an issue of distribution, rather than an issue of possession?

Judge HINOJOSA. I don't think the amount matters as to when something is distribution. The question is what ratio should you use between crack and powder, because any amount that you distribute is distribution, as opposed to personal use.

But the issue becomes when it is five grams, if it is distribution, should it equal 500 grams of powder to get you the same penalty? But any amount that is distribution is going to be distribution.

Mr. NACHMANOFF. Ranking Member, if I might just address that briefly, Judge Hinojosa, of course, is correct. Any amount of distribution, whether it is the .11 grams that was the example from our district or whether it is kilos, is distribution. It is the act of giving to someone else.

The bills that are proposed that equalize the punishments and allow for individualized punishment by judges can address those issues. Obviously, someone who is distributing .11 grams generally is going to be viewed as less dangerous and less harmful and needing less punishment generally than someone who is distributing large amounts, whether it is crack or whether it is powder.

But what this really points to is the fundamental problem with the current law, which is the rigid over emphasis on quantity as a measure of culpability. And while quantity may be relevant to a judge or a court to determine how someone should be punished, the idea that it should be the only issue that governs the sentence and it should create mandatory minimums is what has been, I think, shown to be a failure here.

It is the ability, to borrow Ms. Shappert's word, to have the holistic opportunity to sentence based on the entire conduct—whether there is violence, whether there is a gun, whether the person was doing this as an accommodation, for pecuniary gain—that allows a judge under individualized sentencing, as Congress demanded, when it passed the Sentencing Reform Act and passed 3553A, which requires judges to consider all of these factors and then to impose an appropriate penalty. And by eliminating mandatory minimums and equalizing punishment, because these substances are pharmacologically identical, will allow judges to be in a position to make those individualized determinations in a fair and appropriate way.

Mr. SCOTT. And I think it is also the way that is inappropriate because of the way they calculate the weight. It is the weight in the entire operation, not talking about the individual's role in that operation. So you can get someone with a tangential role in a big operation, and they are saddled with the full weight of that operation.

Mr. NACHMANOFF. That is absolutely true. That is an issue of reasonable foreseeability. And we see that defendants are saddled with transactions that they took no part in, but because they were part of an organization.

Mr. SCOTT. And because the weight is the only measure.

Let me go to the gentlelady from Texas, and if people have other comments, we will allow you that in a few minutes.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Mr. SCOTT. She has an appointment she has to run to.

Ms. JACKSON LEE. I am sorry to have come in after the testimony of many of you. However, I am comfortable with my assessment, basically, of the perspectives that you have. And I will be quick and pointed.

And, Mr. Short, let me thank you for being a real example of rehabilitation and the idea of the disparity in prosecution particularly, because you were a distributor, but I assume of a small amount of crack. Is that correct?

And had you been doing it for a period of time?

Mr. SHORT. Yes. I was only just running the drugs for like roughly 2 years.

Ms. JACKSON LEE. Two years.

Do you believe that rehabilitation—some intervention—in your life would have been constructive?

Mr. SHORT. Yes, I do.

Ms. JACKSON LEE. Let me ask—it is very hesitant to cross-examine the two distinguished jurists, but if I can ask quick questions with quick answers.

Judge Walton, you just simply want the Federal Government to be fair. Do you think the series of bills that we have articulated today, a number of them by Members of Congress, would begin to address the question of equalizing the disparity?

Judge WALTON. Any of them would address it at least to some degree, yes.

Ms. JACKSON LEE. And do you believe, for example, H.R. 4545 is consistent with the Judicial Conference policy? Does it have some

elements in it, particularly where it says that we focus on the kingpins, the traffickers with large amounts?

Judge WALTON. Absolutely.

Ms. JACKSON LEE. And so if we look to, if you will, balance—not balance, but if we look to correct the disparity—100:1—we would be making an important step forward.

Judge WALTON. I believe so. I believe that it would go a long way in rebuilding a sense of fairness that people have about the process, which I think is very important.

Ms. JACKSON LEE. Let me say that I respect both of you as jurists and really supported the decisions of the Supreme Court that allow you discretion, but, Judge Hinojosa, even though you come as the chairman of the U.S. Sentencing Commission, you know and you heard discussions suggesting that the Supreme Court decisions didn't cover that. The law still was the 100:1.

With that in mind, the Sentencing Commission has asked the Congress to act. How imperative is it to equalize the system. To sort of go back to my comments earlier of due process and mercy, how important it is for the Congress to act, for the President to sign a reform bill?

Judge HINOJOSA. With regards to the comments about the U.S. attorneys, I haven't heard them, but maybe the Justice Department can address this.

It is important, because for many, many years people have viewed this as a ratio that is not appropriate. And our hearings through the years have presented information to the commission that this is not an appropriate ratio. The commission is not here to endorse any particular ratio. In fact, our position has been no more than 20:1.

But we are here to urge action with regards to the mandatory minimum ratio and emergency amendment authority to the commission to therefore quickly put this into effect with regards to the guidelines themselves. But it is important to address the issue, and we appreciate the fact that this hearing is being held, because I think it will be a step in the process and certainly be very helpful.

Ms. JACKSON LEE. One of your instructions was for Congress to participate in the process of reform. Is that not correct?

Judge HINOJOSA. I would hate to say that the commission is instructing Congress to do anything in particular. We would urge Congress to engage in the process of reform. Yes, ma'am.

Ms. JACKSON LEE. I think it is appropriate for me to characterize it as an instruction, and again, I will not attribute it to you.

Ms. Shappert, I understand your perspective is that dangerous persons will go out into the highways and byways of American society. But I would just simply argue or make the point that if we had intervened a long time ago, we might have had a pathway of rehabilitation as opposed to a pathway of incarceration.

What you do with small-time distributors and/or users is incarcerate them in a harsh system. They become more hardened. They become more criminalized, and the only thing that they can do, when they come out after 25 years, 30 years, is to go back into the system of crime.

And so I am not necessarily asking a question. I respect your perspective, but I think this is evidence that it has failed. The jails

are fuller than they have ever been. Families are destroyed, because they don't have their loved ones, who could be breadwinners. Children are without fathers or mothers, and this is absolutely a crisis.

I hope that we can pass the Second Chance bill that will answer some of your questions about the release of these individuals, but I think it is imperative, as U.S. attorneys and others in the criminal justice system, you see the error of your ways and you respect what we are trying to do—prosecute the big guys and let the little guys get rehabilitated.

With that, I yield back my time.

Ms. SHAPPERT. Respectfully, I will not acknowledge the error of my ways, when I don't believe we have erred. We have attempted to enforce the law that the Congress gave us. We are here to change the law in a spirit of comity with the Congress, but in addition to considering those who are in prison, we need to look at the victims in the communities, who have no voice, and I am here to represent them.

Ms. JACKSON LEE. And that I appreciate, and we are looking at the victims. And as I indicated, the scales of justice requires us to look at the victims who are not in jail and those who are in jail, and I think if we help those who have been incarcerated unfairly, we can decrease the number of victims who you are trying to represent.

Ms. SHAPPERT. And there can be no mercy without justice.

Ms. JACKSON LEE. Pardon me?

Ms. SHAPPERT. There can be no mercy without justice.

Ms. JACKSON LEE. There can be no more what?

Ms. SHAPPERT. There can be no mercy, respectfully, without justice.

Ms. JACKSON LEE. But mercy is balanced, and you are not balanced, and that is clear. And the lawyers who are representing the state must also be balanced.

Ms. SHAPPERT. Yes, ma'am.

Ms. JACKSON LEE. And we can work together, I hope, to get where you would like to go to ensure that there is justice and protection of society at the same time Mr. Short and those who I see suffering and languishing in jail because of this absolute inequity can have justice and mercy as well.

And I thank you, Mr. Chairman. [Laughter.]

Mr. SCOTT. Mr. Gohmert, do you have another question?

Mr. GOHMERT. Yes, I did want to ask Judge Hinojosa. There are some reports that a number of inmates affected by retroactive application of the commission's ruling may be higher than originally thought. Has there been any update to the projections since October of 2007?

Judge HINOJOSA. Congressman Gohmert, we made it quite clear that our projection is based on the fact that the model that has been in the statutes as we see it would be followed, which would be the two-level reduction only and limited to that, and only in cases where it would make a difference.

There has been a change in that, because since we came up with the number that had been sentenced and we put out that information at a particular date, there have been more people that have

been sentenced up to November 1st of 2007, before it came into effect.

And there is an added number to that as potentials, but again I emphasize, just like Judge Walton has, eventually this is a decision that is made by judges on an individual basis.

I get confused when I hear that witnesses are gone. These are people who have already been convicted. And judges have the presentencing report, as well as information since the person has been in custody, as well as all the other information that was available at the time that the court made the decision, whether it is the transcript or whatever the sentencing matter, but the pre-sentencing report is there. It isn't like you are going to have another conviction, where you need witnesses with regards to the commissions of offenses.

Mr. GOHMERT. Thank you.

Judge HINOJOSA. Thank you, sir.

Mr. GOHMERT. And gentlemen, with regard to the allegation toward Ms. Shappert, let me just remind everybody that was applauding there, you have got Justice officials, who were supposed to be advocates on one side in this adversary system. You have got good defense lawyers we have here before us. And the judges are the ones that are supposed to have the discretion and utilize mercy and justice as a balance.

And the Justice Department—I guess if you did anything unfair, it would be you followed the law as given to you in 1986 by people who meant well and created a bad law.

So thank you.

Mr. SCOTT. Thank you.

There being no further questions, we may have additional questions for you, and we would ask you to respond to those questions so that their answers can be made part of the record.

Without objection, we have several letters that we would like to get entered into the record, along with four testimonies from Human Rights Watch, the ACLU, the Legal Defense Fund, and Families Against Mandatory Minimums. The hearing will remain open for 1 week for submission of additional materials.

And without objection, this Committee stands adjourned.

[Whereupon, at 5:23 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

WRITTEN TESTIMONY
OF
JULIE STEWART
PRESIDENT
FAMILIES AGAINST MANDATORY MINIMUMS

SUBMITTED TO THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

FEBRUARY 26, 2008

Thank you for the opportunity to submit testimony on behalf of the board, staff and 14,000 members of Families Against Mandatory Minimums (FAMM). We commend the subcommittee for its decision to take a fresh look at the sentencing disparity between crack and powder cocaine. This hearing gives new hope to thousands, including many of our members, who have loved ones serving harsh sentences for low-level, nonviolent drug offenses.

FAMM is a national nonprofit, nonpartisan organization whose mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. FAMM works every day to ensure that sentencing is individualized, humane and no greater than necessary to impose just punishment, secure public safety and support successful rehabilitation and reentry. In our view, punishment should fit the individual and the crime. Too frequently it does not.

We recognize that two decades ago little was known about crack cocaine. There was a vague but compelling perception that this derivative form of cocaine was more dangerous than its original powder form, would significantly threaten public and prenatal health, and greatly increase drug-related violence. Those assumptions drove Congress to adopt a particularly harsh sentencing structure for crack cocaine when it established new, non-parolable mandatory minimums for a host of drug offenses in the Anti-Drug Abuse Act of 1986. That Act imposed the so-called "100:1 sentencing ratio," which dictates that crack defendants receive sentences identical to powder defendants convicted with 100 times as much drug. Now, 22 years later, those perceptions have been repeatedly disproven and discredited. Crack and powder cocaine produce the same psychological and psychotropic effects; crack users are not inherently predisposed to violence; and the effects of prenatal exposure to crack are significantly less than once believed – and less than such exposure to alcohol or tobacco.[1]

Not only is the crack penalty unwarranted and insupportable, it has also caused great harm. As a sentencing system it punishes small time users and dealers the same or worse than international drug kingpins. Moreover, it does so in a way that is discriminatory. The majority of offenders

[1] U.S. Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (2007) at 70 ("*2007 Report*")

arrested, convicted and sentenced on crack cocaine charges are African American, even though they make up less than one third of crack cocaine users. The end result is not safer streets and drug-free cities, but devastated families and broken, suspicious communities.

The crack cocaine penalty structure is the most extreme example of a sentencing system gone badly wrong. Mandatory minimums impose one-size-fits-all sentencing regardless of the fit. Drug mandatory minimums assign one variable – quantity– as the sole determinant of sentence length. But drug quantity is a poor proxy for culpability.

The federal judiciary, as well as criminal justice practitioners and criminal justice experts, have long decried mandatory minimums in general and those for crack cocaine especially.[2] They point out that the current system requires the courts to sentence defendants with differing levels of culpability to identical prison terms. The U.S. Sentencing Commission has for over a decade called upon Congress to address current quantity-based disparities. The Commission has noted that current law overstates the relative harmfulness of crack cocaine compared to powder cocaine; is applied most often to lower level offenders; overstates the seriousness of most crack cocaine offenses and fails to provide adequate proportionality; and impacts most heavily minority communities.[3]

FAMM's case files are filled with the stories of low level offenders sentenced to kingpin size sentences. It is no wonder. The 100:1 ratio can result in sentences for low-level crack offenders that exceed sentences for higher level powder cocaine offenders. For example, "street level" crack cocaine defendants serve 97 months sentences on average, compared to 78 months for powder cocaine wholesalers.[4] Moreover, while the five- and ten-year mandatory minimums

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[2] American Bar Association, *Report of the ABA Justice Kennedy Commission* (June 23, 2004); Judicial Conference of the United States, *Mandatory Minimum Terms Result In Harsh Sentencing* (June 26, 2007); Federal Public and Community Defenders, *Statement of A.J. Kramer, Federal Defender for the District of Columbia on Behalf of the Federal Public and Community Defenders Before the Subcommittee on Crime and Drugs of the Judiciary Committee of the United States Senate* (February 2007); National Association of Criminal Defense Lawyers, *Written Statement of Carmen D. Hernandez on behalf of the National Association of Criminal Defense Lawyers before the U.S. Sentencing Commission RE: Cocaine and Federal Sentencing Policy (November 2006)*

[3] 2007 *Report* at 8

[4] *Id.* at 30, figure 2-14.

were intended by Congress to target the most serious and high level drug traffickers,[5] the majority of street level dealers in 2005 (73.4 percent), the most prevalent type of crack cocaine offender, were subject to five- and ten-year mandatory minimum sentences.[6] In 2006 nearly 80 percent of all crack cocaine offenders were convicted of statutes carrying mandatory minimums.[7] Of all drug defendants, crack defendants are most likely to receive a sentence of imprisonment as well as the longest average period of incarceration.[8]

Furthermore, unlike all other controlled substances, crack cocaine carries a mandatory minimum of five years for a first offense of simple possession of five grams of crack, about the weight of two sugar packets. That is five times the maximum imposable sentence for simple possession of a similar or greater quantity of any other drug.[9]

The vast majority of prisoners serving these unconscionable sentences are black. The crack cocaine penalty structure has been widely and rightly criticized as the source of significant race-based disparity in federal sentencing. In 2006, 81.8 percent of crack cocaine defendants were African American,[10] when, according to the federal government's most recent survey, less than 18 percent of our nation's crack cocaine users in 2005 were African American.[11] The average sentence length for crack cocaine of 122 months (fully 37 months longer than that for powder cocaine) is served overwhelmingly by black prisoners. These differences are due, in large part, to the crack cocaine mandatory minimum penalty.[12] They contribute to average sentence disparities between African American and White offenders of 34.2 months.[13] It is no surprise

[5] Ten year mandatory minimum sentences were intended to target "the kingpins – the masterminds" and five year sentences targeted serious traffickers. See U.S. Sentencing Commission, *Report to the Congress, Cocaine and Federal Sentencing Policy*, May 2002 at 6-7 ("2002 Report").
[6] 2007 *Report* at 21, figure 2-6 and 29, figure 2-13.
[7] *Id.* at 28.
[8] U.S. Sentencing Commission. *Report to Congress: Cocaine and Federal Sentencing Policy* (1995)
[9] 2002 *Report* at 11
[10] 2007 *Report* at 15.
[11] United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Office of Applied Studies, *2005 National Survey on Drug Use & Health*, September 2006
[12] 2002 *Report* at 12.
[13] U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 132.

that such disparity leads to a deleterious perception of race based unfairness in our criminal justice system.[14]

The Sentencing Commission has found that "[t]his one sentencing rule contributes more to the differences in average sentences between African-American and White offenders "than any other factor and revising it will "better reduce the gap than any other single policy change." Reform of crack cocaine sentencing, the Commission points out, "would dramatically improve the fairness of the federal sentencing system."[15]

The long sentences for crack cocaine for low level dealers, despite its irrational premises and its disproportionate racial impact, were considered necessary evils: something we put up with in order to protect our communities. Members of the Justice Department in public statements and testimony often link crack cocaine offenses and violence, or intimidation with the threat of violence.[16] Copious documentation and analysis by the Commission has proven otherwise.

The Commission reports that the vast majority of crack cocaine offenders were not involved in violence. In fact, violence decreased in crack cocaine offenses from 11.6 percent in 2000 to 10.4 percent in 2005.[17] In this study an offense was defined as "violent" if any participant in the offense made a credible threat, or caused any actual physical harm, to another person.

Nor should we fear that our communities will be overrun with crack dealers if sentences were shortened. Drug offenders actually have one of the lowest rates of recidivism of all offenders, ranging from 16.7 percent (Criminal History Category II) to 48.1 percent (Criminal History Category V).[18] More important is the fact that, across all criminal history categories and for all offenders, the largest proportion of "recidivating events" that count toward these rates of

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[14] 2002 *Report* at viii.
[15] U.S. Sentencing Commission, *Fifteen Years of Federal Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (2004) at 132.
[16] Department of Justice, Testimony of the United States Department of Justice, R. Alexander Acosta, U.S. Attorney, Southern District of Florida, Federal Cocaine Sentencing Policy, Before the U.S. Sentencing Commission (November 14, 2006); see also
[17] 2007 *Report* at 37.
[18] U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) at 32.

recidivism are supervised release revocations, which can include revocations based on anything from failing to file a monthly report to failing to file a change of address. In fact, drug trafficking accounts for only a small fraction – as little as 4.1 percent – of recidivating events for all offenders.[19]

FAMM does not oppose punishment; we oppose punishment that is excessive. We do so as a matter of principle but also because we represent prisoners and their loved ones who suffer the most personal consequences that result from unjust sentencing policies. At the heart of this debate are people serving long sentences away from their families and loved ones. Sentences have become so inflated in the past two decades that a 10-year sentence for a nonviolent offender no longer sounds harsh. But 10 years is an extraordinarily long time to be locked away from society. It is 10 years of missed Thanksgiving dinners with family, missed birthday celebrations (their own and that of their children and friends), missed marriages and childbirths and even missed funerals. If these sentences were appropriate, proportionate and fair, such suffering would seem warranted. But the chorus of voices and the criticisms that have been raised against them makes each individual sentencing story particularly poignant. I want to share one such story with you.

Marcus Boyd was arrested on August 20, 1999 after he sold a criminal informant 3.9 grams of crack cocaine. He had met the informant through a close family friend and never suspected that he was working with the St. Clair Drug Task Force. With the additional 1.7 grams found in his pocket at the time, Marcus was held accountable for a total of 5.6 grams of crack. He took his case to trial where he was found guilty after presenting an entrapment defense. At his sentencing the judge based the drug quantity calculation on testimony from the informant and another witness who both claimed that they had bought crack from Marcus on multiple occasions. Although only 5.6 grams of crack were attributed to Marcus at the time of his arrest, he was held accountable for 37.4 grams based on the statements made by the informant and witness.

[19] U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) at 17.

At the time of his arrest, he had been involved with drugs for over six years. His drug use began shortly after his mother's death in 1993 -- Marcus was 18 -- and escalated throughout his early twenties. Marcus did not have a close relationship with his father and consequently alternated living with each of his three half-siblings after his mother died. While Marcus did not graduate from high school, he went on to obtain his GED and held various jobs in the lawn care industry, fast food restaurants and factory work.

Marcus Boyd was only 24 years old when he received his 169-month sentence (a little over 14 years). Had he been sentenced for powder cocaine, his sentence likely would have been between 21- and 27-months.

He has two children who were six and seven at the time of his sentencing. He tries to call each of them at least once every two months, but often finds it difficult to stretch his limited financial means to do so. Unfortunately, he hasn't been able to see his daughter since 2002 and his son since 1999. Marcus works as a barber in his correctional facility and has taken courses in marketing, computers, foreign language and anger management to aid in his rehabilitation efforts.

Marcus made a series of bad decisions. He was addict, a small time dealer and he broke the law. He deserved to be punished, but punishment must be both reasonable and fair. His punishment was neither.

There are so many stories like Marcus's. It is time to fix the system. I urge you to take advantage of the current momentum and support legislation that would eliminate the disparity between crack and powder cocaine.

The Commission recently took a modest step to reform the disparity. They found that the 100:1 drug quantity ratio between crack cocaine and powder cocaine has created problems that "are so urgent and compelling," an interim measure was deemed necessary. The action–a two-level reduction on the sentencing table for crack cocaine offenses–will result in sentences lower by fifteen months on average for defendants sentenced under the Sentencing Guidelines. Sentences

for crack cocaine, once three and six times longer than those for comparably situated powder cocaine defendants will now range from two to five times powder cocaine lengths.[20],[21]

The Sentencing Commission's action, while affording genuine relief for some, cannot affect the underlying mandatory minimum. Only Congress can do that.

We have had this debate for twenty-two years, and each year, as the evidence has mounted, the need and support for real change has become more compelling. The science, the public, the courts, and even the politics are now on the side of reform. We urge you to remedy the insupportable disparity between crack and powder cocaine sentences.

[20] 2007 *Report* at 3.
[21] Federal Public and Community Defenders, *Statement of A.J. Kramer, Federal Defender for the District of Columbia on Behalf of the Federal Public and Community Defenders Before the Subcommittee on Crime and Drugs of the Judiciary Committee of the United States Senate* (February 2007).

HUMAN RIGHTS WATCH

House Judiciary Committee
Subcommittee on Crime, Terrorism, and Homeland Security
"Cracked Justice – Addressing the Unfairness in Cocaine Sentencing"
February 26, 2008

Written Statement for the Record

Carol Chodroff
US Program Advocacy Director
Human Rights Watch

Thank you for the invitation to submit a statement for the record on this important subject.

Human Rights Watch urges Congress to pass legislation to remedy the disproportionately harsh and racially discriminatory penal sanctions for federal crack and cocaine offenses. While the public health, social, and economic consequences of the use and sale of cocaine—in any form—warrant public concern, they do not justify disproportionate prison sentences that are racially discriminatory, violate US treaty obligations, and defy basic principles of criminal justice.

1. **The Racially Disproportionate Impact of Federal Cocaine Sentencing Policy Violates US Treaty Obligations.**

Federal crack cocaine offenders face criminal sentences that are uniquely severe compared to those imposed on other federal drug offenders. The current sentencing structure for cocaine offenses imposes five- and ten-year mandatory minimum sentences for threshold quantities of cocaine. Under what is commonly referred to as the "100-to-1" cocaine sentencing disparity, it takes *one hundred times* as much powder cocaine as crack cocaine to trigger the federal mandatory minimums. By virtue of the 100-to-1 differential, sentences for crack offenders are far higher than those for powder cocaine offenders who engage in equivalent conduct. Crack cocaine is also the only drug whose simple possession triggers a mandatory prison sentence for first-time offenders.

African Americans bear the brunt of the uniquely severe sentences meted out to crack offenders under the federal sentencing laws. Although available evidence indicates there are more white cocaine offenders than black, data from the United States Sentencing

Commission reveal that in 2000, over 84 percent of federal crack defendants were African American, a proportion that did not vary significantly throughout the 1990s.[1]

The racially disproportionate nature of the crack/powder sentencing differential is inconsistent with the United States's obligation to comply with the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), a treaty ratified by the United States in 1994.[2] ICERD requires states parties "to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, ... to equality before the law," including "the right to equal treatment before the tribunals and all other organs administering justice."[3]

Racial disparities in law enforcement do not violate the US Constitution, as long as they are not the result of discriminatory intent. ICERD, by contrast, imposes no discriminatory intent requirement, and prohibits government policies that have racially discriminatory effects:

> In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[4]

Thus, the Committee on the Elimination of Racial Discrimination, which monitors compliance with ICERD, has stated that "[i]n seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, color, descent, or national or ethnic origin."[5]

ICERD proscribes race-neutral practices curtailing fundamental rights that unnecessarily create statistically significant racial disparities, even in the absence of racial animus. Under ICERD, governments may not engage in malign neglect; that is, they may not ignore the need

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[1] U.S. Sentencing Commission, 2000 Datafile, USSCFY00, available at: http://www.ussc.gov/ANNRPT/2000/table34.pdf, *Drug Briefing*, Table 34.
[2] International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, UN Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969.
[3] ICERD, art. 5(a).
[4] ICERD, art. 1(1) (emphasis added).
[5] *See* ICERD, General Recommendation XIV, "Definition of Discrimination (art. 1, para. 1)," para. 2, U.N. GAOR, 48th Sess., Supp. No. 18, at 176, U.N. Doc. A/48/18(1993). See also, Theodor Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination," 79 *The American Journal of International Law* 283, 287-88 (1985).

to secure equal treatment of all racial and ethnic groups, but rather, must act affirmatively to prevent or end policies with unjustified discriminatory impacts.[6]

Specifically with regard to the criminal justice system, the Committee has instructed that "States should ensure that the courts do not apply harsher punishments solely because of an accused person's membership of a specific racial or ethnic group," and added that "[s]pecial attention should be paid in this regard to the system of minimum punishments and obligatory detention applicable to certain offences."[7]

As explained below, there is no rational basis for the 100-to-1 sentencing differential. Accordingly, the disparate impact of this policy upon African Americans violates US treaty obligations under ICERD.

2. The 100-to-1 Sentencing Differential Defies Basic Principles of Criminal Justice and Common Sense.

When Congress enacted the Anti-Drug Abuse Act of 1986, little was known about crack cocaine. Assumptions about the drug drove Congress to adopt uniquely severe penalties for crack offenders. Now, 22 years later, those assumptions have either been disproved or are no longer operative. No inherent differences between crack and powder cocaine justify the 100-to-1 sentencing differential. The two substances are pharmacologically identical and have similar physiological effects.[8] An abundance of empirical data reveals that the inherent dangers of crack do not differ significantly from those of powder cocaine, and that harsh federal sentences have had little impact on the demand for or the availability of the drug.[9] Moreover, the initial violence that accompanied competition among drug groups seeking control over distribution channels in a new drug market in the 1980s has greatly subsided.

The harsh federal sentencing structure for crack has resulted in the incarceration of thousands of low-level offenders, excessively severe sentences for such offenders, a staggering growth in the federal prison population, and a waste of public resources. Human Rights Watch is unaware of any reasoned basis today for retaining sentences for crack offenders that are so much heavier than those for powder cocaine offenders.[10]

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[6] *See* ICERD, art. 2(1)(c): "Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."

[7] ICERD, General Recommendation XXXI, "Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System," para. 34-35.

[8] United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy, 1995,* Washington, D.C., 1995, p. 22.

[9] Id.

[10] For a more detailed discussion of these issues, see: Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs*, vol. 12, no. 2, May 2000; Human Rights Watch, *Cruel and Usual: Disproportionate Sentences for New York Drug Offenders*, vol. 9, no. 2, March 1997; Human Rights Watch, *Race and Drug Law Enforcement in the State of Georgia*, vol. 8, no. 4, July 1996.

A street-level dealer of crack cocaine should not be treated more harshly than a comparable street-level dealer of powder cocaine. We urge Congress to eliminate disparate treatment of crack cocaine offenders and powder cocaine offenders who engage in equivalent conduct. We believe the disparities should be eliminated by increasing the quantities of crack required for a given sentence—not by reducing the requisite quantities of powder. In its 2007 report, the United States Sentencing Commission recommends that Congress reject addressing the 100-to-1 drug quantity ratio by decreasing the five-year and ten-year statutory mandatory minimum threshold quantities for powder cocaine offenses because "[T]here is no evidence to justify such an increase in quantity-based penalties for powder cocaine offenses."[11]

While eliminating the crack/powder sentencing disparity is a critical step, it is not sufficient to reintroduce fairness and proportionality into federal sentencing laws. Human Rights Watch urges Congress to eliminate mandatory minimum sentencing laws that dictate prison sentences based solely on the quantity and type of the drug sold. Harsh penalties based on the arbitrary factors of drug type and quantity fail to distinguish between varying levels of culpability, and fail to ensure that those who occupy more senior positions in drug organizations receive higher sentences than peripheral participants. The current sentencing scheme creates arbitrary sentencing cliffs where a tiny additional amount of drugs can yield vastly higher penalties. The current structure also permits law enforcement to charge street-level sellers with quantities that reflect the aggregate total of numerous sales. Under conspiracy law, low-level participants in a drug enterprise can be sentenced on the basis of drug quantities handled by the entire undertaking.

Congress should rewrite federal drug sentencing laws to return to the judiciary its traditional role of tailoring sentences to the conduct of the individual defendant. Offenders who differ in terms of conduct, danger to the community, culpability, and other factors relevant to the purposes of sentencing should not be treated identically. Judges should be able to exercise their informed judgment and discretion in crafting effective and proportionate sentences in each case. Guidance from Congress and the United States Sentencing Commission can promote the important goal of uniformity in the sentencing of offenders who appear in different federal courts around the country.[12]

Absent change, federal crack cocaine sentences will continue to deepen the racial fault lines that weaken the country and undermine faith among all races in the fairness of the criminal justice system. Congress should eliminate the powder/crack sentencing differential and thereby affirm the principles of equal justice and equal protection of the laws that are the bedrock of our legal system. Elimination of the crack/powder sentencing

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[11] United States Sentencing Commission (USSC), *Report to the Congress: Cocaine and Federal Sentencing Policy,* May 2007, p. 9.

[12] *See United States v. Booker,* 543 U.S. 220, 267 (2005) (affirming the goal of uniformity in sentencing).

disparity and mandatory minimum sentences for drug offenses would also greatly advance US efforts to comply with its treaty obligations under ICERD.

For the foregoing reasons, Human Rights Watch urges Congress to pass legislation to eliminate the 100-to-1 cocaine sentencing disparity, and restore fairness to the federal sentencing of cocaine offenses.

Thank you for your consideration, and please feel free to contact me if I can provide you with any further information.

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February 14, 2008

Honorable Robert C. Scott
Chairman
Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
U.S. House of Representatives
1201 Longworth House Office Building
Washington, DC 20515

Re: Reform of Crack Cocaine Sentencing Laws

Dear Mr. Scott:

I was asked to submit written testimony on behalf of the Federal Public and Community Defenders to the Subcommittee on Crime and Drugs of the Senate Judiciary Committee in connection with its hearing on February 12, 2008, entitled "Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity." I forwarded my initial statement to Mr. Vassar on February 11, 2008.

I now enclose my supplemental statement, which responds to some of the inaccuracies in the testimony presented by the Department of Justice at the hearing on February 12, 2008. Please feel free to provide my initial statement and this supplemental statement to any of your colleagues in the House who may be interested.

Thank you for your leadership on these important issues.

Very truly yours,

A. J. Kramer

A. J. Kramer
Federal Public Defender
District of Columbia

SUPPLEMENTAL STATEMENT OF A. J. KRAMER
Federal Defender for the District of Columbia
On Behalf of the Federal Public and Community Defenders

BEFORE THE SUBCOMMITTEE ON CRIME AND DRUGS
OF THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE

February 12, 2008 Hearing
Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity

Mr. Chairman and Members of the Subcommittee:

This supplemental statement corrects some of the inaccuracies in the testimony presented by the Department of Justice.

1. **The prosecution described by the Department witness exemplifies the abuse of the cocaine sentencing laws to reward serious violent offenders with short sentences in exchange for their cooperation in putting low-level non-violent offenders behind bars for decades, and does not support the Department's arguments.**

Gretchen C. F. Shappert testified on behalf of the Department of Justice on February 12, 2008, urging Congress to take measures to repeal the Sentencing Commission's decision to make the amendment to the crack cocaine guidelines retroactive effective March 3, 2008, and suggesting that current crack cocaine penalties are warranted. Ms. Shappert based her arguments in very large part on a description of a case she recently prosecuted. As Ms. Shappert described it, the jury heard of an episode in which a crack cocaine trafficker engaged in kidnapping and pistol whipping, and the prosecution was based on the cooperation and testimony of citizens of the community who had been victimized by crack-related violence. The facts of the case are as follows.

In this trial, Thomas Joseph Isbell and Jonathan Patterson, two low-level dealers who engaged in no violence, were convicted on the basis of informant testimony in exchange for money, immunity, or substantial reductions in sentence below the applicable mandatory minimum or guideline range. Mr. Isbell, who was completely rehabilitated by the time of trial, is facing a mandatory minimum sentence of ten years and a potentially higher guideline sentence. Mr. Patterson, who has been incarcerated since his arrest, is facing a mandatory minimum sentence of twenty years and a potentially higher guideline sentence.

The prosecution's star cooperating witness, Wallace Horton, directed the kidnapping and carried out the pistol whipping described by the Department witness. Horton sent two underlings to Atlanta to purchase 2 kilograms of cocaine. Once there, they were robbed of $23,000, half the price of the arranged drug purchase. At Horton's direction, they returned to Atlanta and kidnapped the person they believed had arranged the robbery, and took him to Horton's house in Lenoir, North Carolina. Horton began

hitting the kidnap victim with a high powered rifle, but found it awkward because he has only one arm, so retrieved a .357 magnum from an upstairs room and pistol whipped the victim. Horton then threatened the victim's mother, who called the sheriff. The sheriff advised Horton to release the victim safely, which he did. At the sheriff's direction, the victim then telephoned Horton, telling him he now had the drugs. Horton sent his underlings to meet the victim, at which point they were arrested, and Horton was arrested soon thereafter. Horton was never prosecuted for his violent kidnapping, despite the fact that government investigators had pictures of the savage beatings, multiple witnesses, and reports that Horton previously used violence to collect on drug debts. Neither Mr. Isbell nor Mr. Patterson had anything to do with the kidnapping/pistol whipping incident described by Ms. Shappert.

Horton was released from prison on May 15, 2007, and placed on supervised release.[1] Before Horton testified against Mr. Isbell and Mr. Patterson, defense counsel informed the prosecution that they had information that he was again using crack. In response to defense counsel's inquiry, around January 1, 2008, Horton was tested and the test confirmed his drug use. Prior to his testimony in federal court, the government took no action to revoke his supervised release. Thus, he walked in the front door of the courthouse, a free man with the appearance of having cleaned up his act, to testify as the prosecution's star witness against Mr. Isbell and Mr. Patterson.

The only innocent citizens of the community who testified in this trial testified on behalf of Mr. Isbell or Mr. Patterson. A retired Lenoir police detective and lead investigator for the Caldwell County District Attorney's Office testified that Mr. Isbell was a changed person after completing a drug treatment program as a condition of his pretrial release, that he was a good influence on young people in the community, and that he was a great father. A retired intensive probation surveillance officer testified that he saw Mr. Isbell 90 times in 90 days after he completed drug treatment, and each time the house was clean and Mr. Isbell was caring for his baby, acting as a model father. This retired officer saw Mr. Isbell in the community over the two intervening years before his trial, and at all times saw him caring for his son, sober, and working. Mr. Isbell's family members, deacons of the church, couples married for decades, the salt of the earth, all testified to his rehabilitation. The prosecution called Mr. Isbell's landlord to establish that he rented a house, and the landlord testified that Mr. Isbell was a good tenant and that he himself was a customer of Mr. Isbell's car detail shop -- direct evidence of legitimate employment that the prosecution sought to discredit during the course of the trial. Mr. Patterson's family members and other citizens of the Lenoir community, including his pastor, testified that he was a loving father who attended church on a regular basis with his family.

[1] Horton was originally facing 135-168 months on count one for drug trafficking, and 60 consecutive months on count two for using a firearm. At his first sentencing, on May 6, 2002, upon motion of the government, his sentence was reduced to 67 months, with 30 months to run consecutively. On May 9, 2007, he then received an additional reduction based on a Rule 35 motion by the government, reducing the second count from 30 months to six months, which essentially gave him a sentence of time served.

All of the prosecution witnesses other than law enforcement were addict informants or cooperating co-conspirators. The prosecution called 15-20 cooperating informants or co-conspirators. Some were facing mandatory life, others 10 or 20-year mandatory minimums. Some were high level dealers, others were crack addicts. The government has filed on behalf of all of them Rule 35 or substantial assistance motions which will substantially reduce their sentences. One addict received cash. Mr. Patterson's lawyer called five witnesses, all of whom had been incarcerated with one or more of the government's witnesses. Patterson's witnesses testified that they had heard the government's witnesses sharing information and discovery and telling the others what to say.

The only witnesses against the defendants who were not even threatened with prosecution by Ms. Shappert's office were white. This included a white middle-aged couple from Lenoir who testified that they had purchased $500 worth of crack from one of the co-conspirators once a week for ten years. The week before trial was scheduled to begin in July 2007, Ms. Shappert personally went to their home, told them they were not targets, and asked them to testify. If prosecuted, they would have been subject to a mandatory minimum sentence of 20 years and a guideline sentence of nearly 30 years. Another witness who was not under threat of prosecution was a white middle-aged woman who testified that, while acting as a paid confidential informant for the Caldwell County Sheriff's Department, she was addicted to crack. Another white woman, given immunity from prosecution, testified to a long standing crack addiction and to purchasing crack in Lenoir. Of all of the witnesses, only these four witnesses were never even threatened with prosecution.

If you would like further information about this trial, you may contact Henderson Hill at 704 375-8461, or Lisa Costner at 336 748-1885. They represented Mr. Isbell and Mr. Patterson, respectively.

Claire Rauscher, the Federal Defender in the Western District of North Carolina, reports that the Isbell/Patterson prosecution is characteristic of the drug cases prosecuted in that district. The low-level dealers go to prison for a long time while the high-level leaders who testify against them spend relatively little time in prison. This is borne out by Commission statistics showing that the national average for substantial assistance motions is 26%, while it is 40.7% in the Western District of North Carolina.[2]

2. Repealing or limiting the Commission's well-considered and unanimous decision to make the crack cocaine amendment retroactive would reinforce the perception of racial bias.

Amendments lowering guideline sentences for LSD, marijuana, psylicibin, fentanyl, PCE and percocet, all of which benefited primarily white offenders, were made fully retroactive. *See* USSG App. C, amends. 126, 130, 488, 499, 516, 657.

[2] *See* Statistical Information Packet, Western District of North Carolina, FY 2006 at p. 19, http://www.ussc.gov/JUDPACK/2006/ncw06.pdf.

Amendments to the guidelines for fraud, obstruction, escape and money laundering, which likewise benefited primarily white offenders, were made fully retroactive. *See* USSG App. C, amends. 156, 176, 341, 379, 490. The maximum base offense level for drug offenders with the highest sentences allowable was retroactively lowered from 42 to 38, thus lowering the range in Criminal History I from 360 months-life to 235-293 months. *See* USSG App. C, amend. 505. Likewise, the elimination of the two-level weapon enhancement for those convicted and sentenced under 18 USC § 924(c) for using, carrying or possessing a firearm was also made retroactive. *See* USSG App. C, amend. 599. There is surely no reasonable basis to assume that crack offenders are by definition more dangerous than drug trafficking offenders whose base offense levels were the highest allowable or who were convicted of using a firearm.

3. The Department's claims of violence and recidivism are false and misleading, and do not justify a legislative repeal or limitation of the retroactive crack cocaine amendment.

As Judge Walton indicated, any legislation that would prohibit retroactive application of the amendment with respect to anyone who was not a first offender or had no weapon involvement, as the Department suggests, is unworkable and unfair, and makes no sense.

The Department's claims that "nearly 80 percent of the offenders who will be eligible for early release have a criminal history of II or higher," and that "many of them will also have an enhanced sentence because of a weapon or received a higher sentence because of their aggravating role" answers itself: Increases for criminal history, weapon enhancement, or aggravating role adjustment are already included in the sentence and will not be lessened by any new sentence. The Commission's policy statement for judges considering a retroactive sentence reduction provides and has always provided that the judge must leave all guideline application decisions other than the amended guideline unaffected. USSG § 1B1.10(b)(1).

The Commission found that in crack cases in 2005, death occurred in 2.2% of cases, any injury occurred in 3.3% of cases, and a threat was made in 4.9% of cases.[3] Thus, 94.5% of cases involved no actual violence, and 89.6% involved no violence or threat of violence. Only 2.9% of crack offenders in 2005 used a weapon.[4] The Commission also found that although "weapon involvement, by the broadest of definitions," *i.e.*, ranging from weapon use by the defendant to mere access to a weapon by an un-indicted co-participant, "has increased since 2002 in both powder cocaine and crack cocaine offenses, the rate of actual *violence* involved in the offense, *already relatively low*, has declined further during this period."[5] Further, any tendency to violence decreases with age.[6]

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[3] *Id.* at 38.

[4] *Id.* at 33.

[5] *Id.* at 87 (emphasis in original and added).

The Department claims that defendants in Criminal History III have a 34.2% rate of recidivism and that those in criminal history category VI have a 55.2% rate of recidivism. This is false as to crack offenders. These are the average rates for *all* types of offenders. For Criminal History Categories II and higher, drug offenders have the *lowest* rate of recidivism of all offenders[7] Further, across all criminal history categories and for all offenders, the largest proportion of "recidivating events" that count toward rates of recidivism are supervised release revocations, which are based on anything from failing to file a monthly report to failing to report a change of address.[8] Drug trafficking accounts for only a small fraction – as little as 4.1% – of recidivating events for all offenders.[9]

While it is true that crack offenders generally have higher criminal history categories than powder cocaine offenders,[10] as the Commission has explained, "African-Americans have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers" because of "the relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished neighborhoods."[11] Indeed, though African Americans comprise only 15% of drug users, they comprise 37% of those arrested for drug offenses, 59% of those convicted, and 74% of those sentenced to prison for a drug offense.[12]

Because African Americans have a higher risk of conviction than similar White offenders, they already have higher criminal history scores and thus higher guideline ranges, which they will continue to have with a revised sentence. And they are sentenced more often under the career offender guideline, are subjected to higher mandatory minimums for prior drug trafficking felonies under 21 U.S.C. § 841, and are more often disqualified from safety valve relief, each of which, except in narrow circumstances, will disqualify them from relief altogether. Categorically denying retroactivity to offenders simply because they are in Criminal History II or higher would fail to recognize that the

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[6] *Id.*

[7] USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 13 & Ex. 11 (May 2004).

[8] *Id.* at 4, 5 & Exs. 2, 3, 13.

[9] *Id.* at Ex. 13.

[10] USSC, Cocaine and Federal Sentencing Policy 44 (May 2007).

[11] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 134 (2004).

[12] *See* Interfaith Drug Policy Initiative, *Mandatory Minimum Sentencing Fact Sheet*, http://idpi.us/dpr/factsheets/mm_factsheet.htm.

criminal history score is already built into the original guideline sentence and would be built into any new sentence, and would compound the race-related influences on the criminal history score.

4. **The solution to any public safety concerns is for the government to do its job, and to allow judges to do their job.**

Revised USSG § 1B1.10, p.s. provides that, in determining whether a reduction is warranted, and the extent of such reduction, the court "shall consider the factors set forth in 18 U.S.C. § 3553(a)" and "the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment," and "may consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment."

Each prisoner released will be under supervision. If the government wishes to request some additional form of help for a particular prisoner to re-enter society, it should be doing so now, instead of urging Congress to repeal the Commission's well-considered decision to make the sentence reduction retroactive.

5. **The Department's predictions of administrative and litigation burdens have already been disproved, and if credited by Congress to repeal the retroactive amendment, would only require much more substantial, prolonged and complex litigation.**

The Department's dire predictions bear no resemblance to what is actually already happening on the ground. District Court Judges, Probation Officers, Defenders, the Bureau of Prisons and U.S. Attorneys' Offices have been working in a spirit of cooperation for the past two months to ensure an efficient and fair process. U.S. Probation has held two summits attended by hundreds of judges, probation officers, defenders, prosecutors and prison officials. Information and ideas were shared, and consensus on issues of consequence was reached. DOJ representatives announced that they would cooperate in the process.

Implementation is already underway and is running smoothly. For example, in the Western District of North Carolina, where Ms. Shappert is the U.S. Attorney, the Federal Defender, Claire Rauscher, recently met with the District Court Judges, the U.S. Probation Office, and representatives from the United States Attorneys Office (Ms. Shappert was not present) regarding plans for implementing the retroactive amendment. The upshot was that the vast majority of cases will be resolved by agreement, and a few will be litigated by either the government or the defense.

In the Eastern District of Virginia, which has the largest number of prisoners estimated to be eligible for release, the Defender, Michael Nachmanoff, has worked closely for nearly two months with the Probation Office, the U.S. Attorney's Office, and the District Court to develop fair and efficient procedures to handle these cases. In his view, everyone involved is dedicated to effectively implementing the Commission's

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Testimony of Caroline Fredrickson, Director and Jesselyn McCurdy, Legislative Counsel of the American Civil Liberties Union Washington Legislative Office for the Subcommittee on Crime, Terrorism and Homeland Security of the House Committee on the Judiciary on "Cracked Justice – Addressing the Unfairness in Cocaine Sentencing" February 26, 2008

The American Civil Liberties Union (ACLU) would like to thank the Subcommittee on Crime, Terrorism and Homeland Security of the House Committee on the Judiciary for the opportunity to submit testimony for this hearing on "Cracked Justice – Addressing the Unfairness in Cocaine Sentencing." The ACLU is a nonpartisan organization with hundreds of thousands of activists and members and with 53 affiliates nationwide. Our mission is to protect the Constitution and particularly the Bill of Rights. Thus, the disparity that exists in federal law between crack and powder cocaine sentencing continues to concern our organization due to the implications of this policy on due process and equal protection rights of all people. Equally important to our core mission are the rights of freedom of association and freedom from disproportionate punishment, which are also at risk under this sentencing regime.

For many years, the ACLU has been deeply involved in advocacy regarding race and drug policy issues. The ACLU assisted in convening the first national symposium in 1993 that examined the disparity in sentencing between crack and powder cocaine, which was entitled "Racial Bias in Cocaine Laws." Fifteen years ago the conclusion of representatives from the civil rights, criminal justice and religious organizations that participated in the symposium was that the mandatory minimum penalties for crack cocaine are not medically, scientifically or socially justifiable and result in a racially biased national drug policy. In 2002 and 2007, we urged the United States Sentencing Commission (USSC) to support amendments to federal law that would equalize crack and powder cocaine sentences at the current level of sentences for powder cocaine. In 2008, we urge the United States House of Representatives to enact H.R.4545, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007 which would eliminate the unjust and discriminatory 100 to 1 disparity between crack and powder cocaine sentences in federal law.

Background and History

In June 1986, the country was shocked by the death of University of Maryland basketball star Len Bias in the midst of crack cocaine's emergence in the drug culture. Three days after being drafted by the Boston Celtics, Bias, who was African American, died of a drug and alcohol overdose. Many in the media and public assumed that Bias died of a crack cocaine overdose. Congress quickly passed the 1986 Anti-Drug Abuse Act motivated by Bias' death and in large part by the notion that the infiltration of crack cocaine was devastating America's inner cities. Although it was later revealed that Bias actually died of a powder cocaine overdose, by the time the truth about Bias' death was discovered, Congress had already passed the harsh discriminatory crack cocaine law.

Congress passed a number of mandatory minimum penalties primarily aimed at drugs and violent crime between 1984 and1990. The most notorious mandatory minimum law enacted by Congress was the penalty relating to crack cocaine, passed as a part of the Anti-Drug Abuse Act of 1986. The little legislative history that exists suggests that members of Congress believed that crack was more addictive than powder cocaine, that it caused crime, that it caused psychosis and death, that young people were particularly prone to becoming addicted to it, and that crack's low cost and ease of manufacture would lead to even more

widespread use of it. Acting upon these beliefs, Congress decided to punish use of crack more severely than use of powder cocaine.

On October 27, 1986, the Anti-Drug Abuse Act of 1986 was signed into law, establishing the mandatory minimum sentences for federal drug trafficking crimes and creating a 100 to 1 sentencing disparity between powder and crack cocaine. Members of Congress intended the triggering amounts of crack to punish "major" and "serious" drug traffickers. However, the Act provided that individuals convicted of crimes involving 500 grams of powder cocaine or just five (5) grams of crack (the weight of two pennies) would be sentenced to at least five (5) years imprisonment, without regard to any mitigating factors. The Act also provided that those individuals convicted of crimes involving 5000 grams of powder cocaine and 50 grams of crack (the weight of a candy bar) be sentenced to 10 years imprisonment.

Two years later, drug-related crimes were still on the rise. In response, Congress intensified its war against crack cocaine by passing the Omnibus Anti-Drug Abuse Act of 1988. The 1988 Act created a five (5) year mandatory minimum and 20-year maximum sentence for simple possession of 5 grams or more of crack cocaine. The maximum penalty for simple possession of any amount of powder cocaine or any other drug remained at no more than 1 year in prison.

The 100 to 1 Disparity in Federal Cocaine Sentencing Has a Racially Discriminatory Impact and has had a Devastating Impact on Communities of Color

Data on the racial disparity in the application of mandatory minimum sentences for crack cocaine is particularly disturbing. African Americans comprise the vast majority of those convicted of crack cocaine offenses, while the majority of those convicted for powder cocaine offenses are Hispanic. This is true, despite the fact that whites and Hispanics form the majority of crack users. For example, in 2006, whites constituted 8.8% and African Americans constituted slightly more than 81% of the defendants sentenced under the harsh federal crack cocaine laws, while more than 66% of crack cocaine users in the United States are white or Hispanic. Due in large part to the sentencing disparity based on the form of the drug, African Americans serve substantially more time in prison for drug offenses than do whites. The average sentence for a crack cocaine offense in 2006, which was 122 months, was slightly more than 3 years longer than the average sentence of 85 months for an offense involving the powder form of the drug. Also due in large part to mandatory minimum sentences for drug offenses, from 1994 to 2003, the difference between the average time African American offenders served in prison increased by 62%, compared to an increase of 17% for white drug offenders. African Americans now serve virtually as much time in prison for a drug offense at 58.7 months, as whites do for a violent offense at 61.7 months. The fact that African American defendants received the mandatory sentences more often than white defendants, who were eligible for a mandatory minimum sentence, further supports the racially discriminatory impact of mandatory minimum penalties.

For more than 20 years, federal and state drug laws and policies have also had a devastating impact on women. In 2003, 58% of all women in federal prison were convicted of

drug offenses, compared to 48% of men. The growing number of women who are incarcerated disproportionately impacts African American and Hispanic women. African American women's incarceration rates for all crimes, largely driven by drug convictions, increased by 800% from 1986, compared to an increase of 400% for women of all races for the same period. Sentencing policies, particularly the mandatory minimum for low-level crack offenses, subject women who are low-level participants to the same or harsher sentences as the major dealers in a drug organization.

The collateral consequences of the nation's drug policies, racially targeted prosecutions, mandatory minimums, and crack sentencing disparities have had a devastating effect on African American men, women and families. Recent data indicates that African Americans make up only 15% of the country's drug users, yet they comprise 37% of those arrested for drug violations, 59% of those convicted, and 74% of those sentenced to prison for a drug offense. In 1986, before the enactment of federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African Americans was 11% higher than for whites. Four years later, the average federal drug sentence for African Americans was 49% higher. As law enforcement focused its efforts on crack offenses, especially those committed by African Americans, a dramatic shift occurred in the overall incarceration trends for African Americans, relative to the rest of the nation, transforming federal prisons into institutions increasingly dedicated to the African American community.

Mandatory minimums not only contribute to these disproportionately high incarceration rates, but also separate fathers from families, separate mothers with sentences for minor possession crimes from their children, leave children behind in the child welfare system, create massive disfranchisement of those with felony convictions, and prohibit previously incarcerated people from receiving social services such as welfare, food stamps and access to public housing. For example, in 2000 there were approximately 791,600 African American men in prisons and jails. That same year, there were only 603,032 African American men enrolled in higher education. The fact that there are more African American men under the jurisdiction of the penal system than in college has led scholars to conclude that our crime policies are a major contributor to the disruption of the African American family.

One of every 14 African American children has a parent locked up in prison or jail today, and African American children are nine (9) times more likely to have a parent incarcerated than white children. Moreover, approximately 1.4 million African American males – 13% of all adult African American men – are disfranchised because of felony convictions. This represents 33% of the total disfranchised population and a rate of disfranchisement that is seven (7) times the national average. In addition, as a result of federal welfare legislation in 1996, there is a lifetime prohibition on the receipt of welfare for anyone convicted of a drug felony, unless a state chooses to opt out of this provision. The effect of mandatory minimums for a felony conviction, especially in the instance of simple possession or for very low-level involvement with crack cocaine, can be devastating, not just for the accused, but also for that person's entire family.

Facts Dispel the Myths Associated with Crack Cocaine

The rapid increase in the use of crack between 1984 and 1986 created many myths about the effects of the drug in popular culture. These myths were often used to justify treating crack cocaine differently from powder cocaine under federal law. For example, crack was said to cause especially violent behavior, destroy the maternal instinct leading to the abandonment of children, be a unique danger to developing fetuses, and cause a generation of so-called "crack babies" that would plague the nation's cities for their lifetimes. It was also thought to be so much more addictive than powder cocaine that it was "instantly" addicting.

In the more than 20 years since the enactment of the 1986 law, many of the myths surrounding crack cocaine have been dispelled, as it has become clear that there is no scientific or penological justification for the 100 to 1 ratio. In 1996, a study published by the Journal of American Medical Association (JAMA) found that the physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of powder or crack.

For instance, crack was thought to be a unique danger to developing fetuses and destroy the maternal instinct causing children to be abandoned by their mothers. During the Sentencing Commission hearings that were held prior to the release of the commission's 2002 report on Cocaine and Federal Sentencing Policy, several witnesses testified to the fact that the so-called myth of "crack babies" who were thought to suffer from more pronounced developmental difficulties by their in-utero exposure to the drug was not based in science. Dr. Ira J. Chasnoff, President of the Children's Research Triangle, testified before the Sentencing Commission that since the composition and effects of crack and powder cocaine are the same on the mother, the changes in the fetal brain are the same whether the mother used crack cocaine or powder cocaine.

In addition, Dr. Deborah Frank, Professor of Pediatrics at Boston University School of Medicine, in her 10-year study of the developmental and behavioral outcomes of children exposed to powder and crack cocaine in the womb, found that "the biologic thumbprints of exposure to these substances" are identical. Dr. Frank added that small but identifiable effects of prenatal exposure to powder or crack cocaine are prevalent in certain newborns' development, but they are very similar to the effects associated with prenatal tobacco exposure, such as low birth weight, height or head circumference.

Crack was also said to cause particularly violent behavior in those who use the drug. However, in the 2007 report on Cocaine and Federal Sentencing Policy, the Commission includes data that indicates that significantly less trafficking-related violence is associated with crack than was previously assumed. For example, in 2005: 1) 57.3% of overall crack offenses did not involve the use of a weapon by any participant in the crime; 2) 74.5% of crack offenders had no personal weapons involvement; and 3) only 2.9% of crack offenders actively used a weapon. Most violence associated with crack results from the nature of the illegal market for the drug and is similar to violence associated with trafficking of other drugs.

Another of the pervasive myths about crack was that it was thought to be so much more addictive than powder cocaine that it was "instantly" addicting. Crack and powder cocaine are basically the same drug, prepared differently. The 1996 JAMA study found that the physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of powder or crack. The study also concluded that the propensity for dependence varied by the method of ingestion, amount used and frequency, not by the form of the drug. Smoking crack or injecting powder cocaine bring about the most intense effects of cocaine. Regardless of whether a person smokes crack or injects powder cocaine, each form of the drug can be addictive. The study also indicated that people who are incarcerated for the sale or possession of cocaine, whether powder or crack, are better served by drug treatment than imprisonment.

Federal Cocaine Sentencing Should Reflect the Original Legislative Intent of Congress and Focus on High-Level Drug Traffickers

Indeed, if the message Congress wanted to send by enacting mandatory minimums was that the Department of Justice should be more focused on high-level cocaine traffickers, Congress missed the mark. Instead of targeting large-scale traffickers in order to cut off the supply of drugs coming into the country, the law established low-level drug quantities to trigger lengthy mandatory minimum prison terms. The USSC's 2007 report states that 61.5% of crack defendants have low-level involvement in drug activity, such as street level dealers, couriers, or lookouts.

Harsh mandatory minimum sentences for crack cocaine have not stemmed the trafficking of cocaine into the United States, but have instead caused an increase in the purity of the drug and the risk it poses to the health of users. The purity of drugs affects the price and supply of drugs that are imported into the country. The Office of National Drug Control Policy below best explains how purity and price are related to reducing the supply of drugs.

> "The policies and programs of the *National Drug Control Strategy* are guided by the fundamental insight that the illegal drug trade is a market, and both users and traffickers are affected by market dynamics. By disrupting this market, the US Government seeks to undermine the ability of drug suppliers to meet, expand, and profit from drug demand. When drug supply does not fully meet drug demand, changes in drug price and purity support prevention efforts by making initiation to drug use more difficult. They also contribute to treatment efforts by eroding the abilities of users to sustain their habits." National Drug Control Strategy, Office of National Drug Control Policy, The White House, February 2006, page 17.

One indication that the National Drug Control Strategy has not made progress in cutting off the supply of drugs coming into this country is the fact that the purity of cocaine has increased, but the price of the drug has declined in recent years. In the context of a business model, declining prices and higher quality products are what one would commonly expect from most legitimate products (i.e. televisions, computers and cell phones), but not

from illegal cocaine trade. According to ONDCP, for cocaine from 1981 to 1996 the retail price declined dramatically and then rose slightly through 2000. However, the purity or quality of cocaine sold on the streets is twice that of the early 1980s, although somewhat lower than the late 1980s. As a result there is more cocaine available on the street at a lower price. This is a clear indication that this country's drug control policy has not properly focused on prosecuting high-level traffickers in order to reduce the flow or drugs coming into the country.

In the 1995 Commission report on Cocaine and Federal Sentencing Policy, the Drug Enforcement Agency (DEA) explained that powder cocaine is typically imported into the United States in shipments "exceeding 25 kilograms and at times reaching thousands of kilograms." These shipments are generally distributed to various port cities across the country. In 2007, the USSC found that the median drug quantity for powder offenders is 6,000 grams versus 51.0 grams for crack cocaine offenders. Even though the DEA recognizes that importers ship well over 25 kilograms at a time into the country, the discussion about what constitutes a high-level crack cocaine trafficker should at the very least start at the median level of approximately 6000 grams of powder cocaine.

Increasing Support in Congress and by the United States Sentencing Commission for Changing the 100 to 1 Crack Cocaine Disparity

Several members of 110th Congress have introduced legislation addressing the100 to 1 disparity between federal crack and powder cocaine sentences. H.R.4545, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007 was introduced by Representatives Sheila Jackson-Lee (D-TX) and Christopher Shays (R-CT). The ACLU supports this legislation because many of the myths associated with determining the 100 to 1 ratio have been proven wrong by recent data. Numerous scientific and medical experts have determined that the pharmacological effects of crack cocaine are no more harmful than powder cocaine. The effect of cocaine on users is the same regardless of form. Thus, federal law should not make a distinction between sentences for selling or possession of the two drugs and equalizing the disparity is the only fair way to address the 100 to 1 ratio.

The ACLU also commends Representatives Bobby Scott (D-VA) and Charles Rangel (D-NY) for their long-standing efforts to address the federal crack cocaine disparity. Representative Bobby Scott has introduced H.R.5035, Fairness in Cocaine Sentencing Act of 2008 which would eliminate the mandatory minimum sentences for both crack and powder cocaine offenses on the federal level, as well as provide funding for federal and state drug courts. Representative Rangel has introduced H.R.460, the Crack Equitable Sentencing Act of 2007 which would also eliminate the federal crack and powder cocaine disparity.

In addition, Representative Roscoe Bartlett (R-MD) has introduced H.R.79, the Powder-Crack Cocaine Penalty Equalization Act of 2007 legislation that would equalize the trigger quantities of crack and powder cocaine at the current five (5) gram level of crack. The ACLU opposes any measures that would lower the amount of powder cocaine required to trigger a mandatory minimum. Powder cocaine sentences are already severe and increasing the number of people incarcerated for possessing small amounts of cocaine is not the answer to the problem. Additionally, any measures that decrease the amount of powder cocaine would

disproportionately impact minority communities, particularly Hispanic communities, because of the disparate prosecution of powder cocaine offenses. In 2006, 14.3% of all powder cocaine defendants were white, 27% were black and 57.5% were Hispanics. The mandatory sentences for crack cocaine and the disparity with powder cocaine sentences have created a legacy that must come to an end.

In the Senate, S.1711, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007 introduced by Senator Joseph Biden (D-DE), would eliminate the current disparity in federal sentences between crack and powder cocaine offenses. This legislation is the companion bill to Representative Shelia Jackson-Lee's H.R.4545 and would also eliminate the current disparity in federal sentences between crack and powder cocaine offenses. The ACLU supports S.1711 for the same reasons we endorsed H.R. 4545.

Senators Hatch (R-UT) and Kennedy (D-MA) and Senator Sessions (R-AL) have also introduced bills that would reduce the federal crack cocaine disparity from 100 to 1 to 20 to 1. Senators Hatch and Kennedy would increase the amount of crack cocaine that would trigger a five-year sentence to 25 grams and the amount that would trigger a ten-year sentence to 250 grams. Senator Sessions' bill would increase the amount of crack cocaine that would subject a person to the five-year mandatory minimum sentence to 20 grams, but decrease the amount of powder cocaine that would result in a five-year sentence to 400 grams. While we acknowledge the efforts of Senators Hatch, Kennedy and Sessions to reduce the federal crack cocaine disparity, the ACLU supports eliminating the 100 to 1 disparity entirely because there is no justification for treating the drugs differently under the law.

In April 2007, the United States Sentencing Commission (USSC) promulgated amendments to the Federal Sentencing Guidelines that make them more consistent with the statutory mandatory minimums. This guideline amendment became effective November 1, 2007. On December 11, 2007, in a 7-0 unanimous decision, the USSC decided to apply the guideline amendment changes retroactively. This will result in approximately 19,500 prisoners who are serving sentences longer than the five- and ten-year mandatory minimums, as a result of the sentencing guidelines, to be eligible for the sentence they should have received in accordance with the law.

However, even with all these recent developments it is important to remember that the USSC's guideline amendments are only a small step forward in the efforts to reform the federal crack cocaine law. These guideline changes will not eliminate or even significantly alleviate the very long mandatory minimum sentences that many people are serving for crack cocaine offenses.

Conclusion

October 2006 marked the twentieth anniversary of the enactment of 1986 Anti-Drug Abuse Act. In the more than twenty years since its passage, many of the myths surrounding crack cocaine have been dispelled, as it has become clear that there is no scientific or penological justification for the 100 to 1 sentencing disparity ratio. This sentencing disparity has resulted in unwarranted disparities based on race. Nationwide, statistics compiled by the

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February 11, 2008

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The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
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The Honorable John Conyers, Jr.
Chairman
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The Honorable Lamar S. Smith
Ranking Member
Committee on the Judiciary
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Re: Hearings on "Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity"

Dear Chairmen and Ranking Members:

Enclosed is a letter which I am submitting on behalf of a group of former Federal Judges who served on the United States Circuit Courts of Appeal or the United States District Court.

Respectfully submitted,

John S. Martin, Jr.

cc: The Honorable Joseph R. Biden, Jr.

February 11, 2008

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Re: Hearings on "Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity"

Dear Chairmen and Ranking Members:

The undersigned are all former federal judges who served on the United States Circuit Courts of Appeal or the United States District Courts. We write in support of the legislation introduced by Senator Biden which would eliminate the 100-to-1 ratio between crack and powder cocaine.

Having served as federal judges each of us has had occasion to see in practice the injustice that results from the application of this ratio. Those of us who have served as District Court Judges have had the troubling experience of having to impose extremely

harsh and unwarranted sentences on minor violators. Not only does this result in injustice in a particular case but it creates disrespect for the law among those minor violators who present some hope for rehabilitation. Each of us who served on the District Courts could provide poignant examples of the injustice that results from the application of the 100-to-1 ratio. The two that follow are illustrative.

A young man, who was himself an addict, was arrested for selling slightly more than 5 grams of crack on the street. While on bail he turned his life around: he dealt with his addiction; he married and had a child; and he got a job. When he appeared for sentencing the judge had no choice but to impose a five year mandatory sentence. When asked whether he had anything to say before the court imposed sentence, the young man said: "Your Honor I sold this tiny amount of crack [indicating a small space between his fingers] but you are sentencing me the same as someone who sold this amount of cocaine [holding his hands apart]. That's not fair." All the sentencing judge could say in response was: "You are right. It is not fair. But I hope that the fact that you have been treated unfairly here will not dissuade you from continuing the life you have been building with your wife and family when you are finally released from prison."

In another case a man, who was an addict, sat on the stoop outside an apartment building in a poor neighborhood. Occasionally people asked him if he knew where they could purchase crack and he told them the number of an apartment where people were selling crack. As a reward for this conduct, the crack dealers would occasionally give him some crack for his personal use. He faced a guideline sentence of 16 years and a mandatory minimum sentence of 20 years because he had prior convictions for minor street sales of narcotics.

In enacting the mandatory minimums, it was the view of Congress that the Federal government's most intense focus ought to be on major traffickers, the manufacturers or heads of organizations, which are responsible for creating and delivering very large quantities of drugs...." H.R. Rep. No. 99-845, at 11, 99th Cong. (1986). Thus, the quantities adopted to trigger the application of the mandatory minimum were based on the minimum quantity that might be controlled or distributed by a trafficker in a high place in the processing and distribution chain." Id. at 12. As the cases above indicate, experience demonstrates that the application of the 100-to-1 ratio results in the imposition of harsh mandatory sentence on individuals who are at the lowest end of "the processing and distribution chain."

We strongly disagree with those who suggest that the disparity in treatment of powder and crack cocaine should be remedied by increasing the penalties for powder cocaine. The sentences for powder cocaine are harsh enough to provide necessary punishment for serious violators. However, as a result of aggregating small quantities of drugs distributed over an extended period of time and conspiracy charges linking those who play a minor role in the distribution network with the major traffickers by whom they

are employed, the mandatory minimum sentences are often applied to lower level violators, which was not Congress' intent. While the mandatory minimum sentences may be appropriate for the leaders of narcotics conspiracies they are not appropriate for the addict who sells small quantities on the street or for the woman who lives with the major violator and whose children he supports and who does no more than take messages for him from his associates. However, under the mandatory minimum statutes they all receive the same sentence. To lower the amount of powder cocaine triggering a mandatory minimum sentence would simply exacerbate this problem.

The legislation proposed by Senator Biden will remedy an injustice that the United States Sentencing Commission recognized in 1995, when it recommended elimination of the 100-to-1 ratio and which judges and lawyers who practice in the federal court have long decried.

Respectfully submitted,

John W. Bissell, United States District Court for the District of New Jersey, 1982 – 2005

Edward N. Cahn, United States District Court for the Eastern District of Pennsylvania, 1975-1998

Robert J. Cindrich, United States District Court for the Western District of Pennsylvania, 1994 – 2004

Kenneth Conboy, United States District Court for the Southern District of New York, 1987-1993

Edward Davis, United States District Court for the Southern District of Florida, 1979 – 2000

David Warner Hagen, United States District Court for the District of Nevada, 1993-2005

Joseph Hatchett, United States Court of Appeals for the Fifth Circuit, 1979 – 1981; United States Court of Appeals for the Eleventh Circuit, 1981 – 1999

Larry Irving, United States District Court for the Southern District of California, 1982-1990

Nathaniel R. Jones, United States Court of Appeals for the Sixth Circuit, 1979 – 2002

Timothy K. Lewis, United States District Court for the Western District of Pennsylvania,

1991-1992; United States Circuit Court of Appeals for the Third Circuit, 1992 - 1999

F. A. Little, Jr., United States District Court for the Western District of Louisiana, 1984-2006

John S. Martin, Jr., United States District Court for the Southern District of New York, 1990 - 2003

Stephen M. Orlofsky, United States District Court for the District of New Jersey, 1996-2003

Layn R. Phillips, United States District Court for the Western District of Oklahoma, 1987-1991

Sam C. Pointer, United States District Court for the Northern District of Alabama, 1970 - 2000

H. Lee Sarokin, United States District Court for the District of New Jersey, 1979 – 1994; United States Circuit Court of Appeals for the Third Circuit, 1994-1996

Abraham D. Sofaer, United States District Court for the Southern District of New York, 1979-1985

Stanley Sporkin, United States District Court for the District of Columbia, 1986 – 2000

Herbert J. Stern, United States District Court for the District of New Jersey, 1974-1987

Alfred Wolin, United States District Court for the District of New Jersey, 1988 – 2004

cc: The Honorable Joseph R. Biden, Jr.
Chairman
Subcommittee on Crime and Drugs
Committee on the Judiciary
United States Senate
201 Russell Senate Office Building
Washington, DC 20510

JUSTICE ROUNDTABLE
BRINGING THE ADVOCACY COMMUNITY TOGETHER
TO SUPPORT COMPREHENSIVE JUSTICE REFORM

FEB 19 2008

February 15, 2008

Attn: Judiciary Staffer

Co-Sponsor H.R. 460, H.R. 4545, H.R. 5035

Dear Representative:

We are part of the Justice Roundtable, a network of advocacy organizations that shares common goals toward rational reform of the U.S. criminal justice system. Although some of us have already forwarded individual letters to you, we write at this time to provide a collective voice on the critical issue of crack cocaine sentencing reform. We applaud the bipartisan recognition that the mandatory minimum statutes treating one gram of crack cocaine the same as 100 grams of powder cocaine must be corrected.

The Crack-Cocaine Equitable Sentencing Act of 2007 (HR 460), introduced by Rep. Rangel, and The Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007 (HR 4545), introduced by Rep. Jackson Lee (D-TX), are the House bills that come closest to rational reform of crack cocaine penalties. These proposals begin the process of increasing the federal law enforcement focus towards higher-level traffickers. They completely eliminate the current disparity in federal sentencing for crack versus powder cocaine offenses, without a shift in the current powder cocaine penalty. They also eliminate the mandatory minimum sentence for simple possession of crack cocaine, bringing it in line with simple possession of any other drug.

The Fairness in Cocaine Sentencing Act of 2008 (HR 5035), introduced by Rep. Scott, goes further than reform of the crack laws to include elimination of the cocaine mandatory minimum statute. We applaud and support this section of the bill as a first step towards the elimination of mandatory minimum penalties across the board.

Attention to reform of crack cocaine sentences have been gaining momentum over the past several months from the U.S. Sentencing Commission to the U.S. Supreme Court. Indeed, President Bush recently commuted the prison sentence of an individual convicted of a crack offense who served 15 of his 19 year sentence. A change in the mandatory minimum crack statutes, however, can only occur legislatively. It is long overdue that Congress act to completely eliminate the 100 to 1 disparity, by bringing crack sentencing in line with current powder cocaine sentencing. **We ask that you co-sponsor H.R. 460, H.R. 4545 and H.R. 5035 and expeditiously end this "crack" in our system of justice.**

Sincerely,

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General Commission on Religion and Race
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Students for Sensible Drug Policy

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Prisons Foundation

Marsha Weissman
Executive Director
Center for Community Alternatives

Paul Wright
Editor
Prison Legal News

02/19/2008 15:44 FAX 202 225 8354 REP. ROBERT C. SCOTT 004
02/15/08 16:52:51 202-216-0035 -> 202 225 8354 Drug Policy Alliance Page 001

FEB 19 2008

DRUG POLICY ALLIANCE
Reason. Compassion. Justice.

Phone: 202-216-0035 – Fax: 202-216-0803 – www.drugpolicy.org

J.C. Watts & Asa Hutchinson: Reform Crack/Powder Disparity Now

To: Judiciary Staffer
From: Bill Piper, Director of National Affairs
Date: 2/15/2008
Re: **crack/powder disparity**

Momentum is building in both the House and Senate to eliminate the 100-to-1 crack/powder cocaine sentencing disparity. The Senate Crime and Drugs Subcommittee had hearings on the issue this week. The Crime, Terrorism and Homeland Security Subcommittee is tentatively set to have hearings in a few weeks. Former Republican Congressman J.C. Watts and Former Republican Congressman and DEA Administrator Asa Hutchinson had a great op-ed in support of reform in the *Washington Times* earlier this week. It's a must read.

TO: JUDICIARY STAFFER

OPED The Washington Times ★ TUESDAY, FEBRUARY 12, 2008 / PAGE A17

Reforming crack-cocaine law

Will Congress follow the federal sentencing panel?

By J.C. Watts and Asa Hutchinson

Both of us are former Republican congressmen; one of us is the former head of the Drug Enforcement Administration; and neither of us has ever been accused of being "soft on crime." That is why some may find it surprising that we respectfully disagree with our attorney general with regard to federal sentencing guidelines on crack and powder cocaine.

Simple standards of fairness call for the attorney general to support the recommendations of the U.S. Sentencing Commission, which reduce the disparity of sentences and make the changes retroactive.

Attorney General Michael Mukasey recently implied that America's streets will be flooded with violent felons if the Sentencing Commission proceeds with its plans to retroactively apply amended sentencing guidelines to individuals convicted of using crack cocaine. In testimony last week before the House Judiciary Committee, Mr. Mukasey said, "Unless Congress acts by the March 3 deadline, nearly 1,600 convicted crack dealers, many of them violent gang members, will be eligible for immediate release into communities nationwide." This ignores reality and fairness.

Unfortunately, the attorney general failed to consider the process that is in place to protect the public. First, the federal courts will be required to review each case and determine whether the offender should be released. Individuals convicted of violent crimes will not have their sentences reduced, regardless of whether they are in prison for a crack-related offense. Second, we do recognize that some individuals convicted only of drug charges may have simply plea-bargained down their cases from more serious and violent crimes. However, anybody who may pose a threat to society should not be released; and anybody released will have served his mandatory-minimum sentence.

Congress created a federal criminal penalty structure for the possession and distribution of crack cocaine that is 100 times more severe than the penalty structure relating to powder cocaine. African Americans comprise more than 80 percent of federal crack-cocaine offenders. That statistic does not make sense given that two-thirds of all users of crack are white or Hispanic. The disparity in the arrest, prosecution and treatment has led to inordinately harsh sentences disproportionately meted out to African American defendants that are far more severe than sentences for comparable offenses by white defendants. Indeed, the U.S. Sentencing Commission reported that revising this one sentencing rule would do more to reduce the sentencing gap between blacks and whites "than any other single policy change."

The truth is that for years our legal system has enforced an unfair approach to sentencing of federal crack cocaine offenders. The attorney general's approach will perpetuate this unfairness. As Judge Reggie Walton, who represents the Federal Judicial Conference, said, "I just don't see how it's fair that someone sentenced on October 30th gets a certain sentence when someone sentenced on November 1 gets another."

And it makes no sense that somebody arrested for a crack cocaine offense should receive a substantially longer prison term than somebody who is convicted of a powder cocaine offense. When disparities like this exist it offends the high principles of equal treatment under the law and fundamental fairness. The disparate racial impact of the sentencing rules undermines our nation's larger goal of instilling respect for the criminal justice system.

Congress should let stand the unanimous decision of the Sentencing Commission, which was made in December. But Congress must also act to change the federal crack cocaine statute in order to reduce this unfair disparity. A Senate Judiciary subcommittee is scheduled to hold a hearing today to consider reforming the crack cocaine law. We urge Congress to take this opportunity to revisit this injustice in federal law and pass legislation to remedy the unfairness.

Former Rep. J.C. Watts is chairman of J.C. Watts Cos. Former Rep. Asa Hutchinson, a former U.S. Attorney who served as director of the Drug Enforcement Administration under President Bush, is founding partner of the Hutchinson Group, LLC.

WASHINGTON
LEGISLATIVE OFFICE

FEB 05 2008

February 4, 2008

Dear Representative:

Re: ACLU Urges Members of Congress to Support H.R. 4545, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007

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OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with hundreds of thousands of activists and members and 53 affiliates nationwide, we urge you to co-sponsor and support H.R.4545, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007 which would eliminate the unjust and discriminatory 100 to 1 disparity between crack and powder cocaine sentences in federal law.

Currently, the federal crack cocaine law requires that if a person gets caught distributing or possessing 5 grams of crack cocaine, he or she is subject to a five-year mandatory minimum sentence – the same sentence that person would face for distributing 500 grams of powder cocaine. A person convicted of distributing 50 grams of crack cocaine is subject to a ten-year mandatory minimum. It takes 5000 grams of powder cocaine to receive the same ten-year mandatory sentence. This is often referred to as the federal 100 to 1 disparity between crack and powder cocaine.

H.R.4545, a bipartisan bill introduced by Representatives Sheila Jackson-Lee (D-TX) and Christopher Shays (R-CT) would eliminate the current disparity in federal sentences between crack and powder cocaine offenses. The ACLU supports this legislation because many of the myths associated with determining the 100 to 1 ratio have been proven wrong by recent data. Numerous scientific and medical experts have determined that the pharmacological effects of crack cocaine are no more harmful than powder cocaine. The effect on users is the same regardless of form. Thus, federal law should not make a distinction between sentences for selling or possession of the two drugs and equalizing the disparity is the only fair way to address the 100 to 1 ratio.

The ACLU also commends Representatives Charles Rangel (D-NY) and Bobby Scott (D-VA) for their long-standing efforts to address the federal crack cocaine disparity. Representative Rangel has introduced H.R.460, the Crack Equitable Sentencing Act of 2007 which would also eliminate the federal crack and powder cocaine disparity.

Representative Bobby Scott has introduced H.R.5035, Fairness in Cocaine Sentencing Act of 2008 which would eliminate the mandatory minimum sentences for both crack and powder cocaine offenses on the federal level, as well as provide funding for federal and state drug courts. In order for judges to exercise appropriate discretion and consider mitigating factors in sentencing, mandatory minimums for crack and powder offenses must be eliminated, including the mandatory minimum for simple possession. In addition, the ACLU supports alternatives to incarceration in order to reduce the number of people in jails and prisons across the country. However, any alternatives to incarceration should recognize that drug use and addiction are public health problems, properly dealt with outside the criminal justice system. In the context of drug courts, the concern for the ACLU is that they must be closely monitored to ensure that they do not infringe on constitutional protections such as due process rights for defendants. We hope to work with Representative Scott to address some of our concerns about drug courts.

In April 2007, the United States Sentencing Commission (USSC) promulgated amendments to the Federal Sentencing Guidelines that make them more consistent with the statutory mandatory minimums. This guideline amendment became effective November 1, 2007. On December 11, 2007, in a 7-0 unanimous decision, the USSC decided to apply the guideline amendment changes retroactively. This will result in approximately 19,500 prisoners who are serving sentences longer than the five- and ten-year mandatory minimums, as a result of the sentencing guidelines, to be eligible for the sentence they should have received in accordance with the law.

However, even with all these very exciting developments it is important to remember that the USSC's guideline amendments are only a small step forward in the efforts to reform the federal crack cocaine law. **These guideline changes will not eliminate or even significantly alleviate the very long mandatory minimum sentences that many people are serving for crack cocaine offenses. Congress still must act in order to eliminate the statutory 100 to 1 disparity between crack and powder cocaine. The ACLU strongly urges you to co-sponsor and support the passage of H.R. 4545 in order to end this 20-year travesty of justice.** If you have any question, please feel free to contact Jesselyn McCurdy, Legislative Counsel at jmccurdy@dcaclu.org or (202) 675-2314.

Sincerely,

Caroline Fredrickson
Director

Jesselyn McCurdy
Legislative Counsel

02/05/2008 14:35 FAX 202 225 8354 REP. ROBERT C. SCOTT ☑002
ate: 2/5/2008 Time: 10:52 AM To: Scott, The Honorable Bobby @ 225-8354
Page: 001

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

FEB 0 5 2008

February 5, 2008

Re: H.R. 4545, "The Drug Sentencing Reform and Cocaine Kingpin Trafficking Act."

Dear Representative:

The National Association of Criminal Defense Lawyers, a bar association with thousands of criminal defense lawyers who practice in the federal courts across our nation., fully supports elimination of the unwarranted disparity in federal cocaine sentences pursuant to H.R. 4545, "The Drug Sentencing Reform and Cocaine Kingpin Trafficking Act." Federal sentences for drug offenses are based on the weight of the controlled substance. For two decades, federal sentencing laws have treated possession of one gram of crack cocaine as the equivalent of 100 grams of powder cocaine.

As repeatedly documented by United States Sentencing Commission, there is no sound basis -- scientific or otherwise -- for this excessive disparity, perhaps the most notorious symbol of racism in the modern criminal justice system. Eighty-one percent of federal defendants sentenced for crack cocaine are black, and their sentences are 50 percent longer than inmates serving time for cocaine powder. This is true even though two-thirds of crack defendants are low-level street dealers. Also troubling is the fact that the average sentence for possession of crack cocaine is far longer than the average sentences for violent crimes such as robbery and sexual abuse. Because even the appearance of discrimination erodes public confidence in our justice system, Congress should correct this longstanding injustice.

The current penalty scheme not only skews law enforcement resources towards lower-level crack offenders, it punishes those offenders more severely than their powder cocaine suppliers. This is incongruous with Congress's intended targets for the 5- and 10-year terms of imprisonment, mid-level managers and high-level suppliers, respectively.

In light of these well-established factors, the Sentencing Commission took action last year to reduce its crack guidelines without deviating from the mandatory minimum statutes passed by Congress. At the same time, the Commission called on Congress to enact a more comprehensive solution. On behalf of NACDL, I urge you to help complete the unfinished reform process and co-sponsor the "Drug Sentencing Reform and Cocaine Kingpin Trafficking Act." Thank you for considering our views.

Sincerely,

Carmen D. Hernandez
President

"LIBERTY'S LAST CHAMPION"

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Mennonite Central Committee U.S.
Washington Office

FEB 11 2008

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Washington, D.C.
20003

Tel: (202) 544-6564
Fax: (202) 544-2820
mccwash@mcc.org

Dear,

Mennonite Central Committee (MCC) strongly urges you to support the **Drug Sentencing Reform and Kingpin Trafficking Act (S. 1711, H.R. 4545)** introduced by Sen. Joe Biden (D-DE) and Rep. Sheila Jackson-Lee (D-TX). MCC works in more than 70 countries, including the United States, to provide development and peacebuilding resources to marginalized communities. In this country, MCC workers and partners (particularly in urban settings) have witnessed the effects of unfair sentencing regimes that disproportionately affect people of color. The proposed legislation will make cocaine sentencing more equitable and will allow federal law enforcement officers to focus more of their resources on stopping high-level drug trafficking.

In May 2007, the U.S. Sentencing Commission repeated its call for Congress to reform the sentencing requirements for crack cocaine offenses. The USSC's report suggested raising the quantity of crack cocaine that triggers five- and ten-year mandatory minimum sentences and removing the mandatory minimum penalty for simple possession of crack cocaine.

These mandatory minimums, instituted by the Anti-Drug Abuse Act of 1986, were meant to target "serious" and "major" drug traffickers. However, the last two decades have shown this policy to be counter-productive. Because federal officials are forced by law to intervene in cases of small and moderate crack cocaine possession, they cannot focus on targeting drug kingpins. Indeed, only 7 percent of federal cocaine cases are directed at high-level traffickers.

Additionally, the unintended side effect of the Anti-Drug Abuse Act has been the increased and **disproportionate incarceration of African Americans**. The quantity of crack cocaine required for a mandatory minimum sentence is 100 times less than that of powder cocaine, even though the pharmacological effects of using crack and powder cocaine have been shown to be similar. But since African Americans are the primary users of crack cocaine while whites and Hispanics are the primary users of powder cocaine, mandatory minimums unintentionally target African Americans. In fact, while African Americans only make up 15 percent of drug users in the United States, they make up 74 percent of those sentenced to prison for a drug offense ("Cracks in the System," ACLU October 2006). This high level of incarceration has resulted in broken families and weakened communities.

The Drug Sentencing Reform and Kingpin Trafficking Act (S. 1711, H.R. 4545) addresses these problems. By increasing the quantity of crack cocaine required to trigger a mandatory sentence and by removing the mandatory minimum sentence for simple possession, the act treats all people, regardless of race, equally during drug sentencing. It will also allow federal law enforcers to free up resources currently being squandered by targeting street-level cocaine dealers. This will allow the federal government to focus on stopping the drug trade at the source: major traffickers and kingpins. While other legislative proposals address the sentencing disparity between crack and powder cocaine, this act is strongest in ensuring that federal law enforcement resources are used wisely.

We strongly urge you to support the Drug Sentencing Reform and Kingpin Trafficking Act (S. 1711, H.R. 4545).

Sincerely,

Rachelle Lyndaker Schlabach
Director, Washington Office

Unitarian Universalist Association of Congregations
Washington Office for Advocacy
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FEB 11 2008

Rob Keithan
Director

February 8, 2008

Dear Member of Congress:

On behalf of the over 1000 congregations that make up the Unitarian Universalist Association, I urge you to support S.1711/H.R. 4545, the Drug Sentencing Reform and Kingpin Trafficking Act of 2007. This bill, introduced by Sen. Joseph Biden and Rep. Shelia Jackson-Lee, would eliminate the current disparity in federal sentences for crack versus powder cocaine offenses, and establish a grant program to provide drug treatment and rehabilitative services within prisons, jails, and juvenile facilities.

Current federal sentencing guidelines require that an individual convicted of distributing or possessing five grams of crack cocaine be subject to a five-year mandatory minimum prison sentence. To receive a five-year sentence for a powder cocaine offense, an individual would have to distribute 500 grams of powder cocaine. This is a 100 to one disparity for drugs which have the same effects on users and contain nearly the same number of doses gram for gram. With crack cocaine more common in inner-city black communities and powder cocaine more prevalent in white suburban communities, the sentencing disparity between the two forms of the same drug amounts to institutional racism; the average sentence for a federal drug offense for black Americans is 49% longer than it is for whites.

This racism is also present in national drug enforcement. In spite of the fact that there are more white cocaine users, who tend to use powder cocaine, national drug enforcement practices have overwhelmingly targeted inner-city communities of color, causing a disproportionate number of prosecutions of black Americans. According to the ACLU, although black Americans make up only 15% of the nation's drug users, they comprise 37% of persons arrested for drug violations, 59% of those convicted, and 74% of those sentenced to prison for a drug offense.

The Drug Sentencing Reform and Kingpin Trafficking Act of 2007 would revise this unjust disparity in sentencing and would provide funds for drug treatment programs for cocaine offenders. Furthermore, this bill would focus federal law enforcement efforts on serious drug traffickers instead of the neighborhood crack dealers it currently targets.

As a religious organization with a strong, longstanding commitment to racial justice, we stand behind Senator Biden and Representative Jackson-Lee's commendable effort to eliminate the disparity and make our criminal justice system truly just. I urge you to support S.1711/H.R. 4545.

In Faith,

Robert C. Keithan, Director

Reason. Compassion. Justice.

Ethan A. Nadelmann
Executive Director

Ira Glasser
President

February 7, 2008

FEB 0 8 2008

ATTN: Judiciary Staffer

Dear Representative:

The Drug Policy Alliance urges you to eliminate the 100-to-1 crack/powder cocaine sentencing disparity. This disparity has devastated black communities and undermined public safety by encouraging federal law enforcement agencies to target low-level drug law offenders instead of major crime syndicates. There are three bills pending in the House that would eliminate the crack/powder disparity, reprioritize law enforcement towards major drug traffickers, and save taxpayer money: the **Fairness in Cocaine Sentencing Act** (H.R. 5035), the **Drug Sentencing Reform and Cocaine Kingpin Trafficking Act** (H.R. 4545), and the **Crack-Cocaine Equitable Sentencing Act** (H.R. 460).

When the crack/powder disparity was enacted into law in the 1980s, crack cocaine was believed to be more addictive and more dangerous than powder cocaine. Copious amounts of research, including a recent study by the U.S. Sentencing Commission, have shown that the myths first associated with crack cocaine, and the basis for the harsher sentencing scheme, were erroneous or exaggerated.[i] For over two decades, powder cocaine and crack cocaine offenders have been sentenced differently, even though scientific evidence, including a major study published in the Journal of the American Medical Association, has proven that crack and powder cocaine (two forms of the same substance) have similar physiological and psychoactive effects on the human body.[ii]

The crack/powder disparity has accomplished two things: it has devastated black communities and wasted federal resources. **Even though two-thirds of crack cocaine users are white, more than 80% of those convicted in federal court for crack cocaine offenses are African American.**[iii] Moreover, two-thirds of those convicted have only a low-level involvement in the drug trade. **Less than 2% of federal crack defendants are high-level suppliers of cocaine.**[iv] Taxpayer money should be spent wisely, and concentrating federal law enforcement and criminal justice resources on arresting and incarcerating low-level, largely nonviolent offenders has done nothing to reduce the problems associated with substance abuse.

Congressman Charlie Rangel (D-NY) has introduced the Crack-Cocaine Equitable Sentencing Act (H.R. 460), which would eliminate the crack/powder disparity by raising the amount of crack it takes to trigger a federal mandatory minimum sentence to equal that of powder cocaine. Congresswoman Sheila Jackson-Lee (D-TX) and Congressman Christopher Shays (R-CT) have introduced the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act (H.R. 4545), which would eliminate the crack/powder disparity

and establish a grant program to provide substance abuse treatment to people in prison. Congressman Bobby Scott (D-VA) has introduced the Fairness in Cocaine Sentencing Act (H.R. 5035), which would not only eliminate the crack/powder disparity but also eliminate mandatory minimum sentences for crack and powder cocaine offenses and authorize more money for drug courts (H.R..5035). Momentum is building in the Senate too. There are three Senate reform bills, but only one that completely eliminates the disparity (S. 1711).

You and your staff will have an opportunity to learn more about this important issue at upcoming hearings. The Senate Judiciary Committee's Crime and Drug Subcommittee will be holding a hearing on Tuesday, February 12, 2008. The House Judiciary Committee's Crime, Terrorism, and Homeland Security Subcommittee will be holding a hearing later in February.

We urge you to stand up for both racial justice and public safety by co-sponsoring and supporting the Fairness in Cocaine Sentencing Act, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act, and the Crack-Cocaine Equitable Sentencing Act. These bills would right a 20-year wrong.

Sincerely,

Bill Piper
Director of National Affairs

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[i] US Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy. (Washington, DC: US Sentencing Commission, May 2007).
[ii] The Sentencing Project, "Federal Crack Cocaine Sentencing," July 2007.
[iii] US Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy. (Washington, DC: US Sentencing Commission, May 2007).
[iv] Ibid.

FEB 0 8 2008

Religious Action Center
of Reform Judaism

The Religious Action Center pursues social justice and religious liberty by mobilizing the American Jewish community and serving as its advocate in the nation's capital.

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Visit our website at www.rac.org

February 8, 2008

Dear Member of Congress,

On behalf of the Union for Reform Judaism, whose more than 900 congregations across North America encompass 1.5 million Reform Jews, I urge you to eliminate the current disparity in federal sentencing guidelines for crack and powder cocaine offenses as included in the Drug Sentencing Reform and Kingpin Trafficking Act (H.R. 4545/S. 1711).

The Anti-Drug Abuse Act of 1986 has resulted in harsh penalties for low-level offenses involving crack cocaine. Despite evidence that the effects of crack and powder cocaine are physiologically and pharmacologically identical, defendants are subject to a minimum five-year sentence for possession or sale of only five grams of crack cocaine, while the same five-year sentence is given for sale of 500 grams of powder cocaine. As a result, the prison population has ballooned with scores of low-level drug offenders punished by unnecessarily harsh mandatory penalties.

Furthermore, these sentencing disparities disproportionately affect African American offenders. Although this population comprises only 15% of drug users in the United States, 74% of those sentenced to prison for a drug offense are African American.

Preventing and punishing criminal conduct are among the government's primary obligations, but it is also the obligation of government to ensure that no one is unjustly accused, convicted or punished. In Deuteronomy 16:20, the Torah commands us, *Tzedek, tzedek tirdof* ("Justice, justice you shall pursue"); the sages explained that the word *tzedek* is repeated not only for emphasis but to teach us that in our pursuit of justice, our means must be as just as our ends.

As people of faith, we cannot tolerate unjust sentencing characterized by disparity and racism. I strongly urge you to support efforts to end these disparities as included in the Drug Sentencing Reform and Kingpin Trafficking Act (H.R. 4545/S. 1711).

Sincerely,

Rabbi David Saperstein
Director and Counsel

General Board of Church and Society of The United Methodist Church
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Fax: (202) 488-5612 • Email: gbcs@umc-gbcs.org • Website: www.umc-gbcs.org

FEB 0 8 2008

Dear Member of Congress,

The General Board of Church and Society of The United Methodist Church strongly urges you to support the Drug Sentencing Reform and Kingpin Trafficking Act (S. 1711, H.R. 4545) introduced by Senator Biden (D-DE) and Representative Sheila Jackson-Lee (D-TX). This legislation will eliminate the current disparity in federal sentences for crack versus powder cocaine offenses.

The Anti-Drug Abuse Act of 1986 has resulted in harsh penalties for low-level offenses involving crack cocaine. Defendants are subject to a minimum five-year sentence for possession or sale of only five grams of crack cocaine while the same five year sentence is given for sale of five hundred grams of powder cocaine.

Many of the assumptions used in determining the 100:1 ratio between crack and powder cocaine sentences have been proven false by recent data. For instance, the physiological and psychotropic effects of crack and powder cocaine are the same, thereby making crack cocaine use no more harmful than powder cocaine. In addition, the goal of the original legislation of targeting high-level traffickers has failed. The prison population, as well as correlating costs entailed by incarcerating large numbers of inmates, has ballooned because the mandatory penalties apply most often to offenders who are low-level participants in the drug trade.

The result of these harsh mandatory minimum sentences has been nothing short of tragic and unjust. Rather than providing necessary treatment for those addicted to drugs, they have instead received long prison terms. Mandatory drug sentences treat addiction as a crime instead of a public health concern which contributes to the United States' record rate of incarceration. The nearly 2.3 million people in U.S. prisons and jails accounts for 25% of the world's incarcerated. And yet, drug use and abuse continues. Locking up minor drug offenders for long prison terms is not only ineffective, it is inhumane.

The immorality of the current disparity in sentencing for crack and powder cocaine offenses is evident through recent research, which suggests that while African Americans make up only 15% of drug users in the United States, "they comprise 37% of those arrested for drug violations, 59% of those convicted, and 74% of those sentenced to prison for a drug offense" ("Cracks in the System," ACLU October 2006). Further, although whites and Hispanics comprise two thirds of crack cocaine users, 80% of the crack cocaine defendants are African American ("Cracks in the System," ACLU October 2006).

As a people of faith we cannot abide twenty more years of unjust sentencing characterized by disparity and racism – indeed, we cannot abide even one more year. We strongly urge you to support the Drug Sentencing Reform and Kingpin Trafficking Act (S. 1711, H.R. 4545).

Sincerely,

Jim Winkler
General Secretary

02/15/2008 09:45 FAX 202 225 8354 REP. ROBERT C. SCOTT 002
Feb 14 2008 18:49:45 Leadership Confer -> 202 225 8354 Page 001

Leadership Conference on Civil Rights

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Phone: 202-466-3311
Fax: 202-466-3435
www.civilrights.org

February 14, 2008

Support Fair and Rational Sentencing by Eliminating the Sentencing Disparities between Crack and Powder Cocaine

FEB 15 2008

Dear Representative:

On behalf the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, we urge you to eliminate the sentencing disparities between crack and powder cocaine. In the wake of recent changes to the federal sentencing guidelines and recommendations by the U.S. Sentencing Commission (USSC), several worthy reform bills have been introduced in Congress and we urge you to support them. There is substantial bipartisan recognition that the mandatory minimum statute treating one gram of crack cocaine the same as 100 grams of powder cocaine must be corrected and only Congress can do so.

The Crack Cocaine Equitable Sentencing Act of 2007 (H.R. 460), introduced by Rep. Rangel (D-NY), and the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007 (H.R. 4545), introduced by Rep. Jackson Lee (D-TX) and Rep. Shays (R-CT), call for rational reform of crack cocaine penalties. These proposals also begin the process of shifting the federal law enforcement focus from low-level street sellers toward higher-level traffickers. They eliminate the disparity in federal sentencing for crack versus powder cocaine offenses, without a shift in the current powder cocaine penalty. They also bring crack sentencing inline with powder cocaine, as well as with all other drugs, by applying mandatory minimums only to dealers and not those convicted of simple possession.

The Fairness in Cocaine Sentencing Act of 2008 (H.R. 5035), introduced by Rep Scott (D-VA), also represents an important step toward fair and rational drug sentencing. The bill includes the reintroduction of probation into the system to allow for limited discretion in individual cases where officials are confident that an offender has been rehabilitated. We applaud and support the bill as an important first step toward fair and rational sentencing for all drug offenses.

Attention to reform of crack cocaine sentences has gained momentum over the past several months The U.S. Supreme Court has upheld the USSC's guidelines, further highlighting the need for reform. Indeed, President Bush recently commuted the prison sentence of an individual convicted of a crack offense who had served 15 years of his 19 year sentence. A change in the mandatory minimum crack statutes, however, can only occur legislatively. Eliminating the 100 to 1 disparity is long overdue.

We ask that you co-sponsor H.R. 460, H.R. 4545, and H.R. 5035 and expeditiously end these gross injustices in our system of justice. If you have any questions, please contact Nancy Zirkin, at (202) 263-2880 or David Goldberg, Senior Counsel, at (202) 466-0087, regarding this or any other issue

Sincerely,

Wade Henderson
President & CEO

Nancy Zirkin
Executive Vice President

02/14/2008 09:24 FAX 202 225 8354 REP. ROBERT C. SCOTT ☑002/006
Date: 2/13/2008 Time: 4:16 PM To: Scott, The Honorable Bobby @ 225-8354
Page: 001

FEB 14 2008

2900 Van Ness Street, N.W., Holy Cross Hall Room – Washington, D.C. 20008
Tel: 202-806-8500 Fax: 202-537-3806

February 13, 2008

Re: NAADPC Urges Members of Congress to Support H.R. 4545, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007

Dear Representative,

On behalf of the ***National African-American Drug Policy Coalition*** (NAADPC), a nonpartisan coalition of more than twenty-six African-American professional organizations with hundreds of thousands of members representing African-American professionals nationwide, we urge you to co-sponsor and support H.R.4545, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007 which would eliminate the unjust and discriminatory 100 to 1 disparity between crack and powder cocaine sentences in federal law.

Currently, federal law requires that a person convicted distributing or possessing 5 grams of crack cocaine is subject to a five-year mandatory minimum sentence – the same sentence that person would face for distributing 500 grams (a little more than 1 pound) of powder cocaine. A person convicted of distributing 50 grams of crack cocaine is subject to a ten-year mandatory minimum. It takes 5000 grams (more than 11 pounds) of powder cocaine to receive the same ten-year mandatory sentence. This is referred to as the federal 100 to 1 disparity between crack and powder cocaine.

H.R.4545, a bipartisan bill introduced by Representatives Sheila Jackson-Lee (D-TX) and Christopher Shays (R-CT) would eliminate the current disparity in federal sentences between crack and powder cocaine offenses. The NAADPC supports this legislation as a much-needed reform of a policy that has had a devastating effect on African-American defendants who have consistently comprised the overwhelming majority of federal crack cocaine prosecutions. The majority of the myths associated with crack cocaine use and distribution that purportedly served to justify the 100 to 1 ratio have been proven wrong. Numerous scientific and medical experts have determined that the pharmacological effects of crack cocaine are no more harmful than powder cocaine. The effect on users is the same regardless of form. Thus, federal law should not make a distinction between sentences for selling or possession of the two drugs and equalizing the sentences is the only fair way to address this injustice.

The NAADPC also commends Representatives Charles Rangel (D-NY) and Bobby Scott

(D-VA) for their long-standing efforts to address the federal crack cocaine disparity. Representative Rangel has introduced H.R.460, the Crack Equitable Sentencing Act of 2007, which would also eliminate the federal cocaine sentencing disparity. Representative Bobby Scott has introduced H.R.5035, Fairness in Cocaine Sentencing Act of 2008, which would eliminate the federal mandatory minimum sentences for both crack and powder cocaine offense. It would also provide funding for state drug courts and create federal drug courts. In order for judges to exercise appropriate discretion and consider mitigating factors in sentencing, mandatory minimums for crack and powder offenses must be eliminated, including the mandatory minimum for simple possession of crack cocaine. In addition, the NAADPC supports alternatives to incarceration in order to reduce the number of people in jails and prisons across the country. However, any alternatives to incarceration should recognize that drug use and addiction are public health problems, properly dealt with outside the criminal justice system. In the context of drug courts, the concern for the NAADPC is that we do not believe federal resources should be used to address low-level drug offenders including those that might benefit from drug courts. We hope to work with Representative Scott to address some of our concerns about drug courts.

In April 2007, the United States Sentencing Commission (USSC) promulgated amendments to the Federal Sentencing Guidelines that make them more consistent with the statutory mandatory minimums. This guideline amendment became effective November 1, 2007. On December 11, 2007, in a 7-0 unanimous decision, the USSC decided to apply the guideline amendment changes retroactively. This will result in approximately 19,500 prisoners who are serving sentences longer than the five- and ten-year mandatory minimums, as a result of the sentencing guidelines, to be eligible for the sentence they should have received in accordance with the law. However, even with all these very exciting developments it is important to remember that the USSC's guideline amendments are only a small step forward in the efforts to reform the federal crack cocaine law. These guideline changes will not eliminate or even significantly alleviate the very long mandatory minimum sentences that many people are serving for crack cocaine offenses. Congress still must act in order to eliminate the statutory 100 to 1 disparity between crack and powder cocaine.

The NAADPC strongly urges you to co-sponsor and support the passage of H.R. 4545 in order to end this 20-year travesty of justice. If you have any question, please feel free to contact Peter Hayden, Policy Committee Chair at *Peter.Hayden@ourturningpoint.org* or (612) 229-6224.

Sincerely,

Peter Hayden, Board Member, NAADPC

WASHINGTON BUREAU · NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
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February 13, 2008

Members
U.S. House of Representatives
Washington, DC 20515

FEB 14 2008

via fax

RE: NAACP SUPPORT FOR LEGISLATION ELIMINATING THE CRACK / POWDER COCAINE SENTENCING DISPARITY

Dear Representative;

On behalf of the National Association for the Advancement of Colored People (NAACP), our nation's oldest, largest and most widely-recognized grassroots civil rights organization, I strongly urge you to co-sponsor and support H.R. 4545, the *Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007.* This legislation would restructure the sentencing range for a conviction of crack cocaine possession and bring the current disparate sentencing range in line with that for powder cocaine.

The tremendous disparity in the punishment for possession of crack cocaine and powder cocaine is unjust, racially disparate and undermines the authority of the 14th Amendment, which guarantees equal protection under the law from disproportionate punishment. Furthermore, the current 100 to 1 quantity ratio has had a disproportionate and devastating impact on the African American community. Everyone seems to agree that crack cocaine use is higher among Caucasians than any other group: most authorities estimate that more than 66% of those who use crack cocaine are white. Yet in 2006, 82% of those sentenced under federal crack cocaine laws were African American. When you add in Hispanics, the percentage climbs to above 96%.

Under current law, a person convicted of possessing 5 grams of crack cocaine is facing a mandatory minimum sentence of 5 years in jail; while an individual convicted of possessing 499 grams of powder cocaine may face a misdemeanor charge and a maximum sentence of one year behind bars. This is especially unjust in light of the fact that pharmacologically, crack and powder cocaine are identical drugs.

Elimination of the unjust 100 to 1 quantity ratio between crack cocaine and powder cocaine would be the first step toward restoring to judges the discretion to impose fair, informed and responsible sentences. I therefore urge you again, in the strongest terms possible, to support and work for the enactment of legislation to completely eliminate the sentencing disparity between crack and

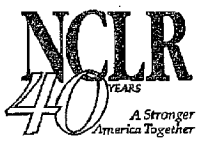
powder cocaine convictions and for the restoration of fairness in our legal system. Please contact me as soon as possible and let me know what I can do to help you ensure that this unfair policy is repealed.

The NAACP also supports legislation introduced by Congressman Robert "Bobby" Scott (VA) and Charles Rangel (NY) which would eliminate the 100 to 1 federal disparity between crack and powder cocaine sentencing. Congressman Scott's bill (H.R. 5035, *The Fairness In Cocaine Sentencing Act of 2008*) would eliminate federal mandatory minimum sentences for cocaine offenses, regardless of the drug's form, as well as provide funding for federal and state drug courts. Congressman Rangel's legislation (H.R. 460, the *Crack-Cocaine Equitable Sentencing Act of 2007*) would also eliminate the federal crack and powder cocaine disparity.

Thank you in advance for your attention to the NAACP position. Should you have any questions or comments, please do not hesitate to contact me at my office at (202) 463-2940.

Sincerely,

Hilary O. Shelton
Director



Janet Murguía
President and CEO

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February 14, 2008

Dear Representative:

On behalf of the National Council of La Raza (NCLR) – the largest national Hispanic civil rights and advocacy organization in the U.S. – I write to express our support of the "Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007" (H.R. 4545) introduced by Representative Sheila Jackson-Lee (D-TX). This legislation corrects more than 20 years of erroneous sentencing practices affecting mainly minorities in this country.

Contrary to popular belief, the fact that Latinos and other racial and ethnic minorities are disproportionately disadvantaged by sentencing policies is not because minorities commit more drug crimes, or use drugs at a higher rate, than Whites. Instead, the disproportionate number of minority drug offenders appears to be the result of a combination of factors, including the current disparity in federal sentences for crack versus powder. Currently, the federal crack cocaine law requires that a person convicted of distributing or possessing five grams of crack cocaine is subject to a five-year mandatory minimum prison sentence; conversely that same person would get a five-year sentence for distributing (not possessing) 500 grams of powder cocaine. If convicted of distributing 50 grams of crack cocaine, a person is subject to a ten-year mandatory minimum, while it will take 5,000 grams of powder cocaine to receive the same mandatory sentence.

NCLR supports H.R. 4545 because it eliminates the threshold differential between crack and powder sentences. Given that crack is derived from powder cocaine, and that crack and powder cocaine have exactly the same physiological and pharmacological effects on the human brain, equalizing the ratio 1:1 is the only fair solution to eradicating the disparity.

In addition, NCLR urges Congress to resist proposals that would lower the powder thresholds to achieve equalization between crack and powder. According to data from the U.S. Sentencing Commission, reducing the powder threshold would have a disproportionate, negative impact on the Latino community. NCLR believes that the only proper way of equalizing the ratio is by raising the crack threshold to the levels of powder, not by lowering the powder threshold that triggers the mandatory minimum sentences.

NCLR applauds Representative Jackson-Lee for her leadership on this bill, and recommends the approach of this legislation because it is the only way to return to this nation's commitment to the principle of equality under the law. If you have any questions, please contact my staff member Angela Arboleda, Director of Civil Rights and Criminal Justice Policy, at (202)776-1789 or at aarboleda@nclr.org.

Sincerely,

Janet Murguía

Janet Murguía
President and CEO

PREPARED STATEMENT OF CHUCK CANTERBURY, NATIONAL PRESIDENT, GRAND LODGE, FRATERNAL ORDER OF POLICE

Good afternoon, Mr. Chairman, Ranking Member Gohmert, and distinguished Members of the Subcommittee on Crime. My name is Chuck Canterbury, National President of the Fraternal Order of Police, the largest law enforcement labor organization in the United States, representing more than 325,000 rank-and-file police officers in every region of the country.

The Fraternal Order of Police has been at the forefront of this debate for many years. In previous Congresses, the FOP has supported legislation addressing the so-called sentencing "disparity" between crack cocaine and powdered cocaine by raising the penalties for powder. This has been our position for more than a decade, and we stand by it.

Our immediate concern, however, is the passage and enactment of H.R. 4842, introduced by Representative Lamar Smith of Texas, the Ranking Member on the full Committee. This bill would prevent the recent changes to the sentencing guidelines adopted by the U.S. Sentencing Commission from being applied retroactively.

In the past two years, I have testified twice before the U.S. Sentencing Commission. In 2006, I urged them not adopt changes to the sentencing guidelines that would lower the penalties for crack cocaine offenses by two levels. The Commission had done so on two previous occasions, but fortunately those amendments were rejected by Congress on each occasion. Regrettably, this time Congress failed to act and the amendment lowering the penalties for crack cocaine offenses that was adopted went into effect on 1 November 2007.

Later that same month, I was the only witness from a law enforcement organization to appear before the U.S. Sentencing Commission to address their plan to apply these new, lowered guidelines retroactively and facilitate the release of thousands of crack dealers. Obviously, we strongly opposed this action.

Yet again, the views of the rank-and-file officer—the men and women who put their lives on the line to confront, capture, and convicted these dealers was disregarded and the Commission decided to apply the new guidelines retroactively.

The Commission's own data indicates that at least 19,500 crack dealers will be eligible for early release. It should also be noted that these sentencing reductions would be in addition to any other reductions the offender received, such as a reduction for cooperation with the United States or "good time" credit in prison. It is important that Congress recognize that these are not "low-level dealers" or first time offenders. At least 80% of them had previously been convicted of a crime, a majority of them have multiple prior convictions and 35% of them also possessed a firearm in connection with their drug dealing operation. Further, more than 15% of these offenders are in the highest criminal history category (VI). Clearly, these inmates are far more likely to reoffend.

These are not empty statistics—but hard facts. While the new guidelines have certainly weakened the overall fight against crack-related crime, retroactive application of the guidelines will have an immediate and deleterious effect on public safety and the crime rates in our communities. Using the Commission's own data, it is projected that at least 2,500 additional crack dealers will be released into the community either immediately or within the first year of retroactive application. Another 5,000 could be released into the community within twenty-four months of the effective date of the retroactive application. Further, while the average reduction in sentence is approximately 27 months, some offenders—primarily those who are the most likely to be high-level dealers with significant criminal histories—could see their sentences reduced in excess of 49 months. At a time when law enforcement is seeing an increase in crime rates that have fallen for more than a decade, it seemed at variance with common sense and good public policy to release en masse crack dealers and drug offenders into our neighborhoods. Yet, the Commission has voted to do so.

Let me give you some concrete examples as to how the retroactive application of these new guidelines may affect real communities and the people that live there. Consider the case of Leonard Brown. Mr. Brown, before his arrest, conviction, and sentencing, was the main drug supplier for Sandersville, Georgia, a rural community with approximately 10,000 residents. Mr. Brown, prior to being selected by a jury of his peers to serve a sentence that this Commission now deems to be too lengthy, has an impressively long criminal history, which includes crimes of violence and drug dealing. Yet, despite this impressive body of work, the best efforts of local and State law enforcement authorities were not sufficient to remove Mr. Brown from the community. The State judicial system had become a revolving door that resulted in placing violent drug dealers back in their community after an all too brief period of incarceration. Obviously, this frustrated local and State law enforce-

ment officers as well as the residents of Sandersville—whose safety was at risk—while Mr. Brown's business was in operation.

The Federal prosecution and sentencing of Mr. Brown, however, had a ripple effect in Sandersville. Admittedly, the actual amounts of crack cocaine possessed by Mr. Brown at the time of his arrest for the offenses for which he is currently incarcerated were not particularly high, but for a community the size of Sandersville, Mr. Brown served as a kingpin of sorts, supplying a substantial amount of drugs from his trailer. As befits a person of his standing, he employed minors to do the actual leg work, exposing them to all the risks, while he reaped the rewards. It was not until he was prosecuted by Federal authorities, however, that he was held to account for his crimes. His conviction, the significant sentence he received and the fact that he would not be eligible for parole sent a clear message that there were serious consequences for drug dealers if they were prosecuted by Federal authorities. It also sent a message to the residents of Sandersville—that the criminal justice system was not completely broken and that a long-time drug dealer like Mr. Brown could and would go to jail and stay there.

If the changes to the sentencing guidelines were made retroactive, Mr. Brown's sentence will be reduced by approximately three years, making him eligible for immediate release. This also sends a clear message—that we are not serious about getting and keeping drug dealers out of communities. The residents of Sandersville, Georgia, should be outraged because they know it will not take long for Mr. Brown to return to business.

Let me give you another example—a drug dealer from Chattanooga, Tennessee by the name of Sylvester Pryor. Like Mr. Brown, his criminal history includes possession of crack for resale, possession of deadly weapons, and two assaults on a law enforcement officer. He was arrested on Federal charges with the aid of a confidential informant and sentenced to nine years and six months in prison. If the latest revisions to the U.S. sentencing guidelines are made retroactive, Mr. Pryor may be eligible for immediate release.

Jesse Lee Evans was the leader of a drug ring operating in Pennington, Alabama. Over the course of a year and a half, he sold crack out of his house in Choctaw County until undercover officers executed several controlled drug buys enabling his arrest. Mr. Evans was classified as Criminal History Category IV and was sentenced to more than 21 years, but would be eligible for release immediately if the changes to the sentencing guidelines are made retroactive.

These are but a few examples of how the retroactive application of the new rules will have an immediate and certainly very negative effect on communities and their residents. Federal prosecutions were brought to bear on these two criminals because the State and local systems were unable to keep them locked up. With the new guidelines, and certainly with applying them retroactively, we risk bringing the revolving door into the Federal system.

I think it is important to remember the incalculable devastation wrought on our nation during the crack epidemic—millions of lives were damaged and families wrecked by this drug and many of our cities have never fully recovered. Just ask the people in Sandersville or Pennington how many lives were ruined by Leonard Brown or Jesse Lee Evans and their drug businesses. Or ask the officers that were attacked by Sylvester Pryor in Chattanooga. As a nation, we worked hard over the past fifteen years to reduce our nation's crime rates to historic lows and this success was due in large part to the efforts of State and local law enforcement and a genuine commitment by the Federal government to incarcerate for longer periods of time these offenders who dealt in crack cocaine. While other drugs of the moment may have eclipsed crack in popularity and availability, the market for crack remains massive—with nearly one million Americans who continue their addiction to this terrible drug. In our view, retroactive reduction of the sentences of the criminals responsible for creating and feeding these addictions is a grievous error which will inflict great harm on many innocent Americans. For this reason, we urge the Congress to adopt H.R. 4842 and to reject the retroactive application of the new sentencing guidelines.

I want to thank you and the Subcommittee in advance for your consideration of the view of the more than 325,000 members of the Fraternal Order of Police, and I hope that you recognize the sincerity of our position.

I would now be pleased to answer any questions you might have.

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